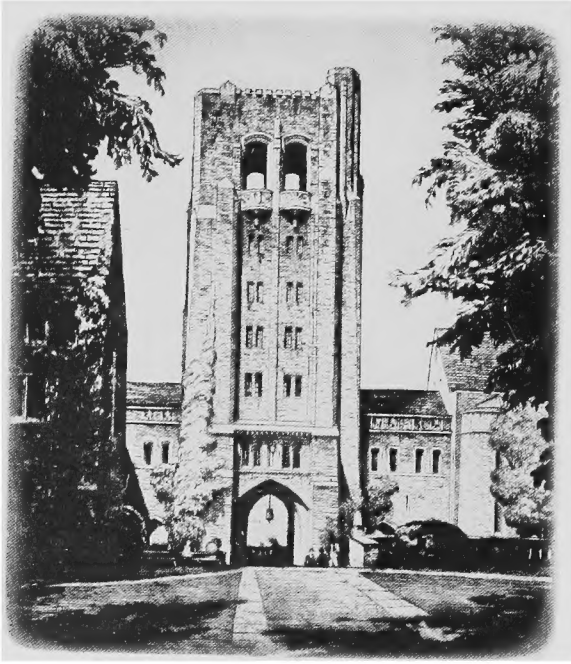


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A treatise on the law of sale of persona



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A TREATISE
ON
THE LAW OF SALE
OF
PERSONAL PROPERTY

BY

ussell
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SALE OF PERSONAL PROPERTY.

BOOK III.

OF THE AVOIDANCE OF THE CONTRACT.

CHAPTER I.

PURPOSE AND SCOPE OF BOOK III.

§ 798. Nature of the subjects here considered.

799. What subjects included.

800. How classified.

§ 798. **Nature of the subjects to be now considered.**—In the preceding chapters consideration has been given to the questions, how the contract of sale may lawfully be made, how it is to be interpreted, and what is its effect in transferring title. It is proposed now to determine how a contract of sale, actually or apparently entered into, may be avoided by one or both of the parties to it.

§ 799. **What subjects included.**—The class of subjects to be now considered includes those chiefly in which, while it may be admitted that a contract has in form at least been entered into, there is still opportunity for the claim that one or both of the parties is at liberty to withdraw from it upon the ground, either (1) that the supposed consent of the parties was really not given at all, or (2), if given, has been withdrawn by mutual consent, or (3) was given upon the understanding that it might be rescinded under certain circumstances, or (4) was given upon a consideration which has failed, or (5) was

given under such circumstances of (a) mistake, (b) misrepresentation, (c) absence of consideration, (d) fraud, and the like, as really to amount to no contract at all, or (6) was given for or upon a consideration which was illegal, so that there was no contract in law.

§ 800. **How classified here.**— Without attempting to go into all of the subjects here suggested, consideration will be given to the most important of them, as follows:

- I. Rescission of the contract in accordance with the agreement of the parties.
- II. Avoidance of the contract for failure of consideration.
- III. Avoidance of the contract for mistake.
- IV. Avoidance of the contract for innocent misrepresentation.
- V. Avoidance of the contract for fraud —
 - (a) Upon the seller.
 - (b) Upon the buyer.
 - (c) Upon the seller's creditors.
 - (d) Upon subsequent purchasers.
- VI. Avoidance of the contract for illegality.

CHAPTER II.

OF AVOIDANCE OF THE CONTRACT BY CONSENT OF PARTIES.

§ 801, 802. In general.

I. TERMINATION OF CONTRACT BY SUBSEQUENT MUTUAL CONSENT.

803. Contract may be discharged by agreement.

804. — Executory contracts.

805. — Executed contracts.

806. Substitution of a new contract.

807. — Intention must be clear.

808. Introduction of new parties.

809. Formalities of rescission — Delivery.

810, 811. One party alone cannot rescind — Breach of contract acquiesced in, as a rescission.

II. TERMINATION OF THE CONTRACT IN PURSUANCE OF THE ORIGINAL AGREEMENT.

812. Parties may stipulate for subsequent termination.

§ 813. Right may be reserved to terminate for any cause.

814. — Or may be limited to particular cause or event.

815. — Or may be limited as to time and manner.

816-819. Usually no rescission of executed sale for mere breach of warranty — Allowed in some States.

820. May be rescission for fraudulent warranty.

821. Contract may provide for rescission for mere breach of warranty.

822. — Rescission for breach of warranty on sale of implements.

823. — Form.

824. — Conditions.

825. — Unless waived, conditions precedent.

826, 827. Rescission for non-payment of price.

§ 801. In general.— Assuming that a contract of sale has been entered into, it is, in general, just as competent for the parties to it to unmake it as to make it in the first instance. That which exists by their consent may equally, in general, cease to exist by the same consent.

§ 802. —. The consent of the parties that their contract shall come to an end may be given either (1) after the contract is fully completed and as a new and separate agreement, or (2) there may have been incorporated in the contract itself, at the time of its formation, some term or stipulation in pursu-

ance of which the contract might subsequently be terminated by either or both of the parties to it. Each of these forms requires some consideration. And as much of the matter relates to the elements of contracts, the subject may, perhaps, best be shown by using largely the language of elementary writers upon contracts. Thus—

I.

TERMINATION OF CONTRACT BY SUBSEQUENT MUTUAL CONSENT.

§ 803. **Contract may be discharged by agreement.**—“A contract may be discharged,” says Sir William Anson,¹ “by agreement between the parties that it shall no longer bind them. This is a waiver or rescission of the contract.” This agreement, however, like the original one, must exhibit the necessary incidents of contract. The parties must be competent, they must still retain their interest in the contract, and their agreement must be founded upon sufficient consideration. With respect of the consideration required, a distinction must be made between those contracts which remain wholly executory and those which have been executed by one or both of the parties.

§ 804. — **Executory contracts.**—In the case of the executory agreement, “the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, often stated, that ‘a simple contract may, *before breach*, be waived or discharged without a deed and without consideration,’ must be understood to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities.”²

¹ Anson on Contract (7th ed.), p. 273.

² Anson on Contract, p. 273.

In *Collyer v. Moulton* (1868), 9 R. I. 90, 98 Am. Dec. 370, it is said: “There is some apparent inconsistency in the language used in the reports and text-

writers as to the manner in which a simple contract may be annulled.

We think the rule is, that so long and so far as the contract remains executory and before breach, it may be annulled by agreement of all

§ 805. — Executed contracts.—“There seems to be no authority,” continues Sir William Anson,¹ “for saying that a contract, executed upon one side, can be discharged before breach, without consideration — that where A has done all that he was bound to do and the time for X to perform his promise has not yet arrived, a bare waiver of his claim by A would be

parties; but that when it has been broken, and a right of action has accrued, the debt or damages can only be released for a consideration; and even so far as it remains executory it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side. Dane, 5, 112; Johnson v. Reed, 9 Mass. 78, 6 Am. Dec. 36; Cummings v. Arnold, 3 Metc. (Mass.) 486-489, 37 Am. Dec. 155; Richardson v. Hooper, 13 Pick. (Mass.) 446; Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363.”

In a valuable note to Bryant v. Isburgh, 74 Am. Dec. 657, it is said: “All executory contracts may be rescinded by the parties to them, if they continue interested until the agreement to rescind is made. Johnson v. Reed, [*supra*]; Blood v. Enos, [*supra*]. It has been said that courts require as clear evidence of waiver of contract by mutual assent as of the contract itself. Carolan v. Brabazon, 3 Jo. & Lat. 200; Dial v. Crane, 10 Tex. 444; Quincy v. Tilton, 5 Greenl. 277. On the other hand, it is said that an agreement to rescind may be shown by such circumstances, or by such a course of conduct, as clearly evidences the intention of the parties that it shall so operate. Wheeden v. Fisk, 50 N. H. 125; Green v. Wells, 2 Cal. 584; Robinson v. Page, 3 Russ. 114; Murray v. Harway, 56 N. Y. 337. And Parsons says further, that ‘if either party, without right, claims to

rescind the contract, the other party need not object, and if he permits it to be rescinded it will be done by mutual consent. Nor need this purpose of rescinding be expressly declared by the one party in order to give to the other the right of consenting, and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind.’ 2 Parsons on Cont. (7th ed.) 678. At all events, mere loose conversations will not be sufficient proof of waiver of a contract by agreement (Moore v. Crofton, 3 Jo. & La T. 438); nor will negotiations for abandonment or rescission constitute a rescission, unless such was the evident intention of the parties. Robinson v. Page, 3 Russ. 114; Murray v. Harway, 56 N. Y. 337. So an offer to rescind, which is not accepted, will not have such effect. Fripp v. Fripp, Rice’s Ch. 84.”

¹ Anson on Contract, pp. 273, 274. He quotes Parke, B., in Foster v. Dawber, 6 Exch. 839. as follows: “It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. *But an executed contract cannot be discharged except by release under seal or by performance of the obligation*, as by payment, where the obligation is to be performed by payment.”

an effectual discharge to X. In fact, English law knows nothing of the abandonment of such a claim, except by release under seal, or for consideration. The plea of 'waiver' under the old system of pleading was couched in the form of an agreement between the parties to waive a contract, an agreement consisting of mutual promises, the consideration for which is clearly the relinquishment of a right by each promisee. Where a discharge by waiver is alleged as a defense in an action for breach of contract, the cases tend to show that the defendant must set up, in form or substance, a mutual abandonment of claims, or else a new consideration for the waiver."

§ 806. Substitution of a new contract.— Instead of simply terminating the old contract the parties may substitute another for it, in whole or in part. This has been well stated by Professor Harriman¹ as follows: "Any valid alteration of the terms of the original contract will amount to the substitution of a new contract and the discharge of the original contract.² The new contract will be identical with the old, except so far as the terms have been altered. A written contract may be rescinded by a subsequent oral contract; and this though the original contract is within the statute of frauds.³ But if the new contract is itself within the statute of frauds, it must expressly rescind the old.⁴ If the second contract is within the statute of frauds as well as the first, and is not in substitution for the first, the first contract remains in force.⁵ The distinction between the substitution of a new contract for the old, by which the old is entirely discharged, and the substitution of a new mode of performance must be kept carefully in mind. Although the second contract may not be in substitution for the first, the performance of the second contract may be ac-

¹ Harriman's Elements of the Law of Contracts, p. 284.

² Citing Taylor v. Hilary, 1 C. M. & R. 741.

³ Citing Goss v. Lord Nugent, 5 B. & Ad. 58; Cummings v. Arnold, 3 Metc. (Mass.) 486.

⁴ Citing Noble v. Ward, L. R. 2 Ex. 135; Moore v. Campbell, 10 Ex. 323.

⁵ Citing Moore v. Campbell, *supra*; Whittier v. Dana, 10 Allen (Mass.),

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cepted as a substituted performance of the first, and so discharge the first contract. In that case, however, it is not the second contract, but the performance of it, which discharges the original contract.”¹

§ 807. — Intention to discharge old contract by new one must be clear.— But in order that the old contract shall be held discharged by implication, “the intention to discharge the original contract must clearly appear from the inconsistency of the new terms with the old. A mere postponement of performance, for the convenience of one of the parties, does not discharge the contract.

“This question has often arisen in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, then refuses to accept the goods at all, and then alleges that the contract was discharged by the alteration of the time of performance; that a new contract was thereby created, and that the new contract is void for non-compliance with the seventeenth section of the statute of frauds.

“But the courts have always recognized ‘the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver, at the request of another,’ and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed he does so at his own risk. For if the market value of the goods which he should have accepted at the earlier date has altered at the later date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place and when by non-performance the contract was broken, or when he ultimately

¹ Citing *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. R. 122; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140.

As a matter of pleading, a party who relies upon the substituted con-

tract cannot prove it if he has alleged only the original contract, as there would be a variance between his allegations and proofs. *King v. Faist* (1894), 161 Mass. 449, 37 N. E. R. 456.

exhausted the patience of the vendor and definitely refused to perform the contract.”¹

§ 808. Introduction of new parties.—The contract may also be discharged and perhaps a new one made by the introduction or substitution of new parties. As has been seen,² every man has a right to choose with whom he will deal, and he cannot have new parties thrust upon him without his consent. Any attempt to do so may be wholly disregarded by him, or may be treated as a repudiation. He may, however, consent to the change. Thus, “if A owes B, and B owes C, and it is agreed by these three parties that A shall pay this debt to C, and A is by this agreement discharged from his debt to B, and B is also discharged from his debt to C, then there is an obligation created from A to C, and C may bring an action against A in his own name.”³

So “if A has entered into a contract with X and M, and these two agree among themselves that M shall retire from the contract and cease to be liable upon it, A may (1) insist upon the continued liability of M, or (2) he may treat the contract as broken and discharged, or (3) by continuing to deal with X after he becomes aware of the retirement of M, he may enter into a new contract to accept the sole liability of X; he cannot then hold M to the original contract.”⁴

§ 809. Formalities of rescission — Delivery as against creditors.—In general the same formalities are necessary for the rescission of the executed contract of sale as would be required for making it in the first instance.⁵ For example, upon the agreement to rescind an executed sale of a chattel or resell it to the original vendor, the same delivery is, in general, requi-

¹ Anson on Contract, pp. 275, 276. Citing *Ogle v. Earl Vane*, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272.

² See *ante*, § 267.

³ 1 Parsons on Contracts (8th ed.), *218.

⁴ Anson on Contract (7th ed.), p. 277.

See Mechem's Elements of Partnership, §§ 274-276.

⁵ *Robinson v. Pogue* (1888), 86 Ala. 257, 5 S. R. 685; *Miller v. Smith* (1818), 1 Mason (U. S. C. C.), 437, Fed. Cas. No. 9,590.

site to preserve the sale as against the creditors of the original vendee, now vendor,¹ as would have been necessary on the sale to him.² “But where by the terms of the agreement, or by a fair implication therefrom, the article thus sold or resold is to remain in the possession of the vendor for a specific time or for a specific purpose as part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be complete and sufficient.”³

§ 810. One party alone cannot rescind — Breach by one acquiesced in by other as rescission.— It is clear enough that one party alone cannot ordinarily rescind the contract or force the other to rescind, unless his act is in some way authorized or acquiesced in by the other. What two at least are needed to make, one alone cannot ordinarily undo. But while one alone cannot thus usually unmake the contract, the act of one may be so treated or regarded by the other that the combined acts of both will result in a termination. Many instances will be met with hereafter wherein one party has broken or repudiated the contract on his part, and the other, at his option, may either treat that act as a breach and recover damages for it, or he may acquiesce in it as a termination of the contract and thus bring it to an end.⁴

§ 811. — Thus, for example, if the seller has undertaken to supply goods of a certain kind, or at a certain time, or in a certain amount, or at a certain place, the buyer is not bound to receive goods of a different kind, or at a different time, or in a different amount, or at a different place. The seller's performance is here a condition precedent to the buyer's liability;

¹ Folsom v. Cornell (1889), 150 Mass. 115, 22 N. E. R. 705; State v. Intoxicating Liquors (1873), 61 Me. 520; Colcord v. Dryfus (1893), 1 Okla. 228, 32 Pac. R. 329; Quincy v. Tilton (1828), 5 Greenl. (Me.) 277.

² As to these, see *post*, Avoidance

of Contract for Fraud upon Creditors.

³ Hotchkiss v. Hunt (1860), 49 Me. 213.

⁴ See *post*, § 1088; Filley v. Pope (1885), 115 U. S. 213; Norrington v. Wright (1885), 115 U. S. 188; Pope v. Allis (1885), 115 U. S. 363.

and if the seller makes default in any of these particulars, the buyer may treat the contract as broken simply and claim damages for the breach, or he may treat the contract as at an end. He is not, in any event, bound to give the seller another trial, or wait while the seller experiments to see if he can perform his contract,¹ and he may, of course, insist upon strict performance without rescinding.

II.

TERMINATION OF THE CONTRACT IN PURSUANCE OF THE ORIGINAL AGREEMENT.

§ 812. Parties may stipulate for subsequent termination.

At the time of making the contract the parties may expressly stipulate that the contract shall come to an end, or may, at the option of one of the parties, be terminated, upon the happening of some event or for some reason specified. In such a case, though one party alone may have the option, the contract is terminated in pursuance of it by the consent of both.

Where such a contract, however, is in writing, and the writing purports to contain all the terms agreed upon, a stipulation that one party may terminate it in a certain event cannot be annexed by word of mouth.²

¹ Thus in *American White Bronze Co. v. Gillette* (1891), 88 Mich. 231, 50 N. W. R. 136, the court, per Morse, J., said: "I know of no rule of law, in such a case as this, where the manufacturer has tendered goods or machinery in performance of a written order or agreement of purchase that obliges the purchaser, if the article or articles do not conform to the agreement, to permit the manufacturer to keep on tendering other goods or new machinery until the terms of his contract are performed, unless the contract expressly provides that he shall have such opportunity. When, as in this case, the article

delivered is not of the description of the article ordered, the purchaser has a right to reject it, and to rescind the contract *in toto*."

² *Lilienthal v. Suffolk Brewing Co.* (1891), 154 Mass. 185, 28 N. E. R. 151, 26 Am. St. R. 234. Here was an apparently complete written contract for the sale of hops at a certain price, but the buyer contended that it had signed it on the oral condition that if, when its president, who acted for it, returned from a trip he was then about to make, he should find that the price named was not the market price, it was not to be a sale. Said the court: "It is admitted that if the

§ 813. Right may be reserved to terminate for any cause.

It is of course competent for the parties to stipulate that one party shall have the right to terminate the contract for any reason which he deems sufficient, or to limit the right to be exercised only for a specified reason. Instances of the first sort have already been observed in dealing with the contract of "sale or return."¹ As has there been seen, if the vendee, for example, may buy or return, he may return the article and terminate the contract for any reason satisfactory to himself; and the same principle applies to the contracts already considered of "sale upon approval"² and "sale if satisfactory."³ Similar to these is a recent case in which it was stipulated that, if the buyer should be "dissatisfied" at the end of the year, the seller should refund the money and the buyer should reconvey the chattel.⁴

§ 814. Right to terminate may be limited to particular cause or event.—On the other hand, the contract may limit the party's right of termination to a particular cause or event, and in such case he cannot terminate the contract except for that cause or in that event. Thus, to recur again to cases already several times referred to, if the contract is that the buyer of a machine may return it if it does not do good work, his right to return and terminate the contract is dependent on the fact that it does not do good work,—a fact of which he would not necessarily be the only judge.⁵ But if, on the contrary, the

alleged condition was a condition subsequent, the defendant [the buyer] was not entitled to prove or to rely upon it. There could be no argument that it was a subsequent modification of the written memorandum. It was strictly contemporaneous talk. *Clark v. Houghton*, 12 Gray, 38, 41. This being so, of course the defendant could not modify by spoken words the effect of a writing signed by it, which purported to set forth all the terms of the bargain, and to bind the defendant unconditionally to accept

the hops. *Davis v. Randall*, 115 Mass. 547, 15 Am. R. 146; *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Gordon v. Niemann*, 118 N. Y. 152, 23 N. E. R. 454; *Daly v. Kimball Co.*, 67 Iowa, 132, 24 N. W. R. 756."

¹ See *ante*, §§ 675-685.

² See *ante*, §§ 657-662.

³ See *ante*, §§ 663-671.

⁴ *O'Rourke v. Schultz* (1899), 23 Mont. 285, 58 Pac. R. 712.

⁵ *Manny v. Glendinning* (1862), 15 Wis. 50.

stipulation is that he may return the machine if it does not suit him, he may return it if he is not suited, though the machine were one with which he ought to have been suited.¹

§ 815. Time and manner of terminating may be limited.

The cause or event which shall justify termination may not only be thus limited, but the parties may also limit the time within which or the method by which the right to terminate shall be exercised. Where this is done, these provisions stand in the attitude of conditions precedent, and, unless the other party waives them, there can be no termination except within the time or by the method so specified.²

§ 816. Usually no rescission of executed sale for mere breach of warranty — Permitted in some States.— It is the general rule, as will be more fully seen hereafter, that, in the absence of fraud³ or an agreement to rescind,⁴ an executed and completed sale — as distinguished from the merely executory one — cannot be rescinded for a mere breach of warranty. In the case of the *executory* contract, as will be seen,⁵ if the articles when tendered do not conform to the warranty, the vendee may reject them, or if, after receiving them, he discovers that they do not conform to the warranty, he may return them; but the buyer of a specific and ascertained chattel must usually retain the chattel and find his remedy in an action for damages.⁶

In a few States, however, the buyer who finds that he has not received the kind of article which it was expressly or impliedly warranted to be is not “compelled to retain a chattel, purchased upon a warranty which is broken and be put to his action for damages, when it may be altogether unsuitable to his wants, and not possessing those essential qualities absolutely

¹ Goodrich v. Van Nortwick (1867), 43 Ill. 445. Compare also Clark v. Rice, 46 Mich. 308, 9 N. W. R. 427, and Plano Mfg. Co. v. Ellis, 68 Mich. 101, 35 N. W. R. 841.

² See *post*, § 824

³ As to which, see chapter VI, following.

⁴ As to which, see following sections.

⁵ See *post*, § 1805.

⁶ See *post*, § 1755.

necessary to make it useful to him." He may, if he has not waived his right, rescind the sale, even though there was no fraud, and, on restoring or offering to restore the article, may recover what he has parted with for it. This rule prevails in Massachusetts¹ (whence it is often called the Massachusetts rule), and in Maine,² Maryland,³ Missouri,⁴ Alabama,⁵ Iowa,⁶ Kansas⁷ and Wisconsin.⁸

§ 817. — It is, of course, true everywhere, as will be seen hereafter,⁹ that where the contract is executory, and the undertaking of the seller, in respect of the kind of goods, amounts to a condition precedent, the buyer may refuse to receive the goods if they do not conform to the condition, or may return them, before acceptance, for like reasons; and in certain of the cases cited above this was, in fact, the situation, though the decision was not put upon that ground. Not all of these cases, however, can be so distinguished.

§ 818. — The buyer in these cases is not obliged to rescind: he may do so, or he may retain the chattel and have

¹ *Bryant v. Isburgh* (1859), 13 Gray, 607, 74 Am. Dec. 655; *Smith v. Hale* (1893), 158 Mass. 178, 33 N. E. R. 493, 35 Am. St. R. 485.

² *Marston v. Knight* (1849), 29 Me. 341. See also *Marshall v. Perry* (1877), 67 Me. 78.

³ *Franklin v. Long* (1836), 7 Gill & J. (Md.) 407.

⁴ *Branson v. Turner* (1883), 77 Mo. 489; *Johnson v. Whitman Agl. Works* (1885), 20 Mo. App. 100.

⁵ *Thompson v. Harvey* (1888), 86 Ala. 519, 5 S. R. 825; *Hodge v. Tufts* (1895), 115 Ala. 366, 22 S. R. 422.

⁶ *Rogers v. Hanson* (1872), 35 Iowa, 283; *Upton Mfg. Co. v. Huiske* (1886), 69 Iowa, 557, 29 N. W. R. 621.

⁷ *Weybrich v. Harris* (1883), 31 Kan. 92; *Gale Sulky-Harrow Mfg. Co. v. Stark* (1891), 45 Kan. 606, 26 Pac. R. 8, 23 Am. St. R. 739.

⁸ *Boothby v. Scales* (1871), 27 Wis. 626; *Croninger v. Paige* (1880), 48 Wis. 229.

Illinois, on the strength of *Sparling v. Marks* (1877), 86 Ill. 125, is sometimes included in this list; but that this is not the view in that State, see *Kemp v. Freeman* (1891), 42 Ill. App. 500; *Crabtree v. Kile* (1859), 21 Ill. 180; *Owens v. Sturges* (1873), 67 Ill. 366.

In *Louisiana*, under the code, article 2520, the sale may be avoided "on account of some vice or defect in the thing sold, which renders it either useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice." *Flash v. American Glucose Co.* (1886), 38 La. Ann. 4.

⁹ See *post*, §§ 1206 *et seq.*

his action for the damages. If he would exercise his option, he must do so with promptness after his discovery of the breach of warranty. He has a reasonable time, considering all of the circumstances, within which to test the chattel to ascertain whether it conforms to the warranty; but if it does not, he must promptly return or offer to return the article to the seller in rescission of the contract.¹ "It will not excuse the failure to offer to return that the vendor lived at a distance from the vendee, or in another State, if his residence was known. A proposition to that effect, communicated through the medium of the postoffice, is equivalent to a personal offer to return, and secures to the vendee every benefit resulting from it."² A failure to so rescind will be deemed a waiver of the right. Whether he has acted with the requisite promptness, under the circumstances, is usually a question for the jury, though "cases may arise where, although an offer to return was made, the court must say, as a matter of law, it came too late."³

§ 819. —. The buyer's duty here, as generally upon rescission, is to do what he reasonably may to put the parties as nearly as possible in *statu quo*.⁴ This ordinarily includes a restoration of the article purchased in as good condition as when received, and a failure to do this would usually prevent rescission; but this would not be true if the deterioration or injury arose from the exercise by the buyer of any of the rights which the contract gave him, as, for example, to test the goods.⁵ Especially could the seller not complain of any injury, happening without the buyer's fault, where that was the very event against which the seller had given the warranty.⁶

¹ Boothby v. Scales (1871), 27 Wis. 626; Upton Mfg. Co. v. Huiske (1886), 69 Iowa, 557, 29 N. W. R. 621; First Nat. Bank v. Larsen (1884), 60 Wis. 206.

² Barrett v. Strenton, 2 Ala. 181, quoted in Boothby v. Scales, *supra*.

³ Boothby v. Scales, *supra*; Gammon v. Abrams (1881), 53 Wis. 323.

⁴ Upton Mfg. Co. v. Huiske (1886), 69 Iowa, 557, 29 N. W. R. 621.

⁵ See Head v. Tattersall, L. R. 7 Exch. 7.

⁶ Thus in Smith v. Hale (1893), 158 Mass. 178, 33 N. E. R. 493, 35 Am. St. R. 485, where a wagon sold was warranted to carry a certain weight, and it broke down under a less weight, it

§ 820. **May be rescission for fraudulent warranty.**—But while the general rule does not permit rescission for mere breach of warranty unaccompanied by fraud, it is clear that if fraud were present the sale may be rescinded,¹ as will be seen in a later chapter where the conditions and circumstances of rescission for fraud are fully discussed.²

§ 821. **Contract may provide for rescission for mere breach of warranty.**—So while, according to the general rule, the buyer may not rescind for mere breach of warranty, it is entirely competent for the parties to agree that if the article is not found to be as warranted the buyer may return it and rescind the contract; and contracts are very numerous which thus confer a right of rescission in more or less explicit terms, and subject often to carefully defined conditions. Where such a stipulation exists, the buyer, who complies with it, may rescind, even though the rule prevailing in his State might not otherwise permit it.

§ 822. — **Rescission for breach of warranty on sale of implements.**—While, of course, not at all confined to cases of that sort, this provision for rescission in case of a breach of warranty presents itself most frequently, in modern times, in contracts for the sale of implements and machinery. These contracts are commonly made by the use of printed blanks, carefully prepared beforehand by the seller, and those used by different manufacturers and dealers are usually substantially alike. They exhibit, moreover, a constant evolution, the result of experiment and adjudication upon particular provisions. Careful attention to their terms is therefore usually indispensable.

was held that the fact that the wagon was thus broken did not prevent a return and rescission.

¹ Dawson v. Pennaman (1880), 65 Ga. 698; Matteson v. Holt (1873), 45 Vt. 336; Gates v. Bliss (1871), 43 Vt. 299; Frasure v. Zimmerly (1861), 25

Ill. 202; Owens v. Sturges (1873), 67 Ill. 366; Sparling v. Marks (1877), 86 Ill. 125; Freyman v. Knecht (1875), 78 Pa. St. 141; Nelson v. Martin (1884), 105 Pa. St. 229.

² See *post*, ch. VI.

§ 823. — **Form.**—These contracts run through every variety of form, from the simple provision that if the article does not conform to the warranty it may be returned and another substituted in its place,¹—which, of course, would not ordinarily justify rescission; and the alternative provision that if the article does not comply with the warranty it may be returned, when another one will be given in its place *or* the consideration refunded²—which gives an option to the seller,—to the positive one that, if the article does not conform to the warranty, it may be returned, when the notes or other payment will be refunded³—which clearly contemplates rescission of the whole contract; and the still more positive one that on such failure the article may be returned, “and the payment of money or note will be refunded, *ending all further responsibility on the part of either party*”⁴—which leaves no doubt as to the result.

§ 824. — **Conditions.**—These contracts further all provide, in varying forms, that the buyer shall give the article a fair test; that, if it appears not to satisfy the warranty, notice shall be given to the seller, and an opportunity given to send his representative to examine, test and repair it; that the buyer in such test shall render “necessary and friendly assistance;” and, often, that if the article is still deficient, it shall be returned without charge by the buyer to the seller at some specified place. The time when the notice to the seller shall be given and the period within which the test is to be made are also usually prescribed.⁵

¹ For example, see *Hefner v. Haynes* (1894), 89 Iowa, 616, 57 N. W. R. 421; *Davis v. Iverson* (1894), 5 S. Dak. 295, 58 N. W. R. 796.

² This is very common; e. g., *Davis' Sons v. Robinson* (1885), 67 Iowa, 355, 25 N. W. R. 280.

³ For example: *Champion Machine Co. v. Mann* (1889), 43 Kan. 372, 22

Pac. R. 417; *Acker v. Kimmie* (1887), 37 Kan. 276, 15 Pac. R. 248; *McCormick Harvester Co. v. Brower* (1893), 88 Iowa, 607, 55 N. W. R. 537.

⁴ For example: *Sandwich Mfg. Co. v. Feary* (1892), 34 Neb. 411, 51 N. W. R. 1026.

⁵ See fuller discussions in chapter on Acceptance by the Buyer.

§ 825. — **Unless waived, conditions precedent.**— All of these acts are, unless waived, conditions precedent to the buyer's right of rescission, and a failure to perform them will foreclose his right.¹ Express provision to this effect is frequently inserted, in the form of stipulations that failure to comply on the part of the buyer, or continued use, or use beyond a specified term, shall be deemed conclusive evidence of performance by the seller.²

The fuller discussion of these provisions will be found in the later chapter on Acceptance by the Buyer.³

§ 826. **Rescission for non-payment of price.**— In the ordinary case, the seller who has transferred the title and delivered over the possession, without insisting upon payment, or upon giving a term of credit, has no implied right reserved to rescind the sale and recover the goods simply because the buyer does not pay as agreed.⁴ The seller's remedy in such a case rests simply in the contract.

Of course, where fraud is present, a different question arises, and cases may exist wherein the seller may rescind, as will be seen in the chapter on Avoidance of the Contract for Fraud.⁵

So, where payment and the transfer of the title are to be concurrent acts, and the buyer obtains possession in expectation of immediate payment, the seller may regain his goods if payment is not made as was expected.⁶

§ 827. —. Again, where the seller is in possession by virtue of his vendor's lien, he may, in many cases, as will be seen, treat the contract as rescinded in case the buyer makes default in payment.⁷

And the seller may expressly reserve the title until full pay-

¹ *Post*, § 1806.

² *Post*, § 1382.

³ *Post*, § 1363 *et seq.*

⁴ *Kramer v. Messner* (1897), 101

Iowa, 88, 69 N. W. R. 1142.

⁵ See *post*, ch. VI.

⁶ See *ante*, §§ 554-557.

⁷ See *post*, §§ 1681 *et seq.*

ment, though he surrenders the possession;¹ and he may sell upon condition that in case of default the title shall revert in him.²

All of these cases, however, stand upon exceptional ground, and the general rule remains, as stated at the outset, that mere non-payment of the price does not justify rescission by the seller of an executed and completed sale.

¹See *ante*, § 585 et seq.

²See *ante*, §§ 572, 693.

CHAPTER III.

OF AVOIDANCE OF THE CONTRACT FOR FAILURE OF CONSIDERATION.

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| <p>§ 828, 829. Of the nature of the objection in general.</p> <p>I. AS A DEFENSE TO THE BUYER.</p> <p>830. In what cases applicable as defense to buyer.</p> <p>831. How in case goods not delivered at all, or in part only, or were not such as buyer bound to accept.</p> <p>832, 833. How when article received of no value — <i>Caveat emptor</i>.</p> <p>834. How on sale of invalid patent.</p> | <p>§ 835. How in sales of commercial instruments.</p> <p>836. How on sale of goods to which the seller, had no title.</p> <p>837. How in case goods conditionally sold are retaken by seller.</p> <p>II. AS GROUND OF ACTION BY THE BUYER.</p> <p>838, 839. Buyer may have action to recover price paid without consideration.</p> |
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§ 828. Of the nature of this objection in general.—The objection of failure of consideration seems to have an established place in our law, but precisely what is meant by it, or what its limits and effects may be, seem nowhere to be accurately defined. It is often confused with the defense of mistake. It is often applied where a failure of performance of some condition precedent is the true reason. It is often interposed where a breach of an express or, especially, an implied warranty is the real defense. It may also be interposed where fraud or illegality would be a more appropriate defense. Thus, for example, a person who has apparently made a contract for the purchase of an article may, when called upon for performance, show that his apparent promise was not a real promise, because the parties were mistaken as to the subject-matter, the person, and the like. In such cases it is sometimes said that the consideration for his promise has failed, but the true ground is that there was no real promise or consent.

§ 829. — So, where the promise of one party was not to be performed until the other had done some act which he has failed to do, it is frequently said that the consideration for the first party's promise has failed; but it is also true and probably more accurate to say that the contract has been discharged by breach. Again, where the purchaser has been given an article of no value where the seller has expressly or impliedly warranted that the thing should be of value, or where the purchaser has been given an article to which it appears that the seller had no title as he expressly or impliedly warranted that he had, it is often said that the purchaser is relieved from his obligation to pay by the failure of consideration; but it may also be said in either case that his defense would be a breach of warranty. And finally, where there has been such fraud as will justify a rescission of the contract, it is not infrequently said that the party who has been defrauded may be relieved because there has been a failure of the consideration for his promise.

I.

AS A DEFENSE TO THE BUYER.

§ 830. **In what cases applicable as a defense.**—Reserving for other places the consideration of the questions of mistake, fraud, illegality, warranty and performance, it may be asked whether there are any cases in which, in the absence of mistake, fraud, illegality, breach of warranty or failure of performance, the buyer may be relieved from his obligation because of a failure of consideration.

§ 831. **How in case goods not delivered at all, or in part only, or not such as buyer bound to accept.**—Where the goods contracted for are never delivered at all,¹ or, though delivery were tendered, were not of such kind, quality or condition, or in such quantity, at such place or time, that the buyer was bound to receive them, and he rejected them,² or, if delivered,

¹ See, for example, *Nash v. Towne* (1866), 72 U. S. (5 Wall.) 689.

² See, for example, *Pope v. Allis* (1885), 115 U. S. 363.

were returned by virtue of an express or implied right to do so,¹ there would clearly be such an entire failure of consideration as would defeat a recovery by the seller. These matters, as will be seen,² stand as conditions precedent to the buyer's liability. And the same result would ensue if the seller failed, in such respects, in part only where the contract was entire³ or *pro tanto* where it was severable.⁴

§ 832. How when article of no value — Caveat emptor.— Such a defense, however, cannot be interposed merely because the article sold proves to be of no value; for it is well settled that, in the absence of fraud or warranty, either express or implied, a purchaser of an article open to inspection cannot be relieved from his promise to pay because it is subsequently discovered that the article for which he has agreed to pay is of no value. In such cases the doctrine of *caveat emptor* applies. If he gets the article agreed upon, he must pay for it, though it proves to be valueless.⁵

§ 833. —. There may, of course, be express warranties given, and, as will be seen,⁶ the law in certain cases will imply a warranty, as where goods, not open to inspection, are sold by description or sample, or where a manufacturer or dealer undertakes to supply goods of a certain kind or for a certain purpose; but none of these cases is the one now under consideration. "No principle of the common law," said Mr. Justice Davis of the supreme court of the United States,⁷ "has been better established or more often affirmed, both in this country and

¹ See *ante*, §§ 812-815.

² See *post*, §§ 1206 *et seq.*

³ See *Norris v. Harris* (1860), 15 Cal. 226.

⁴ See *Young Mfg. Co. v. Wakefield* (1876), 121 Mass. 91; *Wheadon v. Olds* (1838), 20 Wend. (N. Y.) 174; *Hill v. Rewee* (1845), 11 Metc. (Mass.) 268; *Morgan v. McKee* (1874), 77 Pa. St. 228; *Richards v. Shaw* (1873), 67 Ill. 222. Or, though originally entire, is

treated by the buyer as severable. *Avery v. Wilson* (1880), 81 N. Y. 341, 37 Am. R. 503.

⁵ *Bryant v. Pember* (1873), 45 Vt. 487; *Barnard v. Kellogg* (1870), 10 Wall. (U. S.) 383; *Kircher v. Conrad* (1890), 9 Mont. 191, 18 Am. St. R. 731, 23 Pac. R. 74, and many other cases cited in notes to § 1311, *post*.

⁶ See *post*, § 1320 *et seq.*

⁷ In *Barnard v. Kellogg*, *supra*.

in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interest, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because, if the purchaser distrusts his judgment, he can require of the seller a warranty."

§ 834. — **How in sales of patents.**—This question has arisen frequently in actions brought to recover upon notes or other obligations given upon the sale or assignment of patents for inventions which have subsequently proven to be of little or no value. In such cases it is well settled that if the patent prove to be void, either because the alleged invention was not new or was not useful or because of defects in the issue of the patent, the note or other promise to pay is without consideration, and the money, if paid, can be recovered,¹ or, if not paid, no action can be maintained, even though the seller acted in good faith and both parties supposed the patent to be valid.²

¹ Sandage v. Studabaker Bros. Mfg. Co. (1895), 142 Ind. 148, 41 N. E. R. 380, 51 Am. St. R. 165.

² In Nash v. Lull (1869), 102 Mass. 60, 3 Am. R. 435, Gray, J., said: "Letters patent of the United States can be lawfully granted only for new and useful inventions; and are but *prima facie* evidence of the novelty and utility of the invention described. U. S. Stat. 1837, ch. 45; Corning v. Burden, 15 How. (U. S.) 270, 271. All that is required to make an invention useful, under the patent laws, is that it should be capable of being applied to some practical and beneficial purpose, and not to be frivolous or injurious to the well being or morals of society. If it is useful in

this sense, it is patentable, and the degree of its utility or practical value does not affect the validity of the patent; if it is not useful, a patent for it is void. Lowell v. Lewis, 1 Mason, 185, 186; Bedford v. Hunt, id. 303, 304; Kneass v. Schuylkill Bank, 4 Wash. C. C. 13; Langdon v. De Groot, 1 Paine, 203; Roberts v. Ward, 4 McLean, 565. In a suit brought on a promissory note, the only consideration for which is the assignment of an interest in or right under a patent, the question of consideration depends upon the validity of the patent; if the patent is void, the note is of course without consideration; but if it is valid, the court will not inquire into the adequacy of the con-

But if the patent is valid there may be a recovery notwithstanding the invention proves to be of little value, for the court will not inquire into the adequacy of the consideration.¹

This rule is based, not upon the ground of implied warranty of validity — for it is held that no such warranty is implied,— but upon the ground of a failure of the consideration.²

§ 835. **How in sales of commercial instruments.**—The same kind of question is sometimes raised in actions upon promises to pay for notes, bonds, scrip and other commercial paper which has proven not to be genuine. There is here a failure of consideration which will constitute a defense;³ but the law

sideration. The issue in such a case is, therefore, the same as in a suit in the courts of the United States for the infringement of a patent, the validity of which is denied by the defendant; and so it has been repeatedly adjudged in this and other courts. *Bliss v. Negus*, 8 Mass. 46; *Dickinson v. Hall*, 14 Pick. 217, 25 Am. Dec. 390; *Bierce v. Stocking*, 11 Gray, 174; *Lester v. Palmer*, 4 Allen, 145; *Dunbar v. Marden*, 13 N. H. 311; *Cross v. Huntly*, 13 Wend. (N. Y.) 385; *Geiger v. Cook*, 3 W. & S. (Pa.) 266; *McClure v. Jeffrey*, 8 Ind. 79; *Myers v. Turner*, 17 Ill. 179; *Jolliffe v. Collins*, 21 Mo. 338." *Clough v. Patrick*, 37 Vt. 421, was distinguished, and *Elmer v. Pennel*, 40 Me. 430, was denied. To the like effect, that a promise to pay for a void patent is without consideration, see *Harlow v. Putnam* (1878), 124 Mass. 553; *Jackson v. Allen*, 120 Mass. 64; *Shepherd v. Jenkins* (1881), 73 Mo. 510; *Cowan v. Dodd* (1866), 3 Coldw. (Tenn.) 278; *Bellas v. Hays* (1819), 5 S. & R. (Pa.) 427, 9 Am. Dec. 385; *Keith v. Hobbs* (1878), 69 Mo. 84; *Rowe v. Blanchard* (1864), 18 Wis. 441; *National Bank v. Peck* (1871), 8 Kan. 660. See also *McKee v. Eaton* (1881), 26 Kan. 226.

¹*Green v. Stuart* (1874), 7 Baxt.

(Tenn.) 418; *Myers v. Turner* (1855), 17 Ill. 179, and other cases *supra*.

An English patent, if regular in form and in existence as a document, is, by force of the English decisions (see *Hall v. Conder*, 2 C. B. (N. S.) 22, 53; *Noton v. Brooks*, 7 Hurl. & N. 499; *Trotman v. Wood*, 16 C. B. (N. S.) 479; *Adie v. Clark*, L. R. 3 Ch. Div. 134; *Lawes v. Purser*, 6 El. & Bl. 930; *Smith v. Neale*, 2 C. B. (N. S.) 67; *Bowman v. Taylor*, 2 Ad. & El. 278; *Hills v. Laming*, 9 Exch. 256; *Wiles v. Woodward*, 5 id. 557; *Cutler v. Bower*, 11 Ad. & El. (N. S.) 973), sufficient consideration to support a promissory note made in Massachusetts, even though the patent is in fact invalid for want of novelty, and notwithstanding the fact that under the Massachusetts decisions a note given for an invalid United States patent is without consideration. *Chemical Electric Co. v. Howard* (1889), 148 Mass. 352, 2 L. R. A. 163, 20 N. E. R. 92.

²*Hiatt v. Twomey* (1836), 1 Dev. & Bat. (N. C.) Eq. 315; 3 *Robinson on Patents*, §§ 1230-1239, where this subject is more fully discussed.

³*Wood v. Sheldon* (1880), 42 N. J. L. 421, 36 Am. R. 523; *Thrall v. Newell* (1847), 19 Vt. 202, 47 Am. Dec. 682; *Aldrich v. Jackson* (1858), 5 R. L. 218.

also implies a warranty in such cases, and the subject is reserved for fuller consideration when the subject of implied warranties is reached.¹

§ 836. How on sale of goods to which seller had no title.—A similar question arises also where the purchaser has been divested of the goods by a title superior to that of his vendor, or where the goods have been taken from him as the goods of the vendor upon some claim or process to which the attempted sale must have been subject. Here also is an unquestionable failure of consideration, which will defeat a recovery.² There is also, usually, as will be seen, an implied warranty of title, and the whole question will be considered later.³

§ 837. How in case goods sold conditionally are retaken by the seller.—The defense of a failure of consideration has likewise been interposed in actions brought upon promises to pay for goods which have been delivered upon a contract of purchase or a conditional sale, and which have been subsequently retaken by the vendor. In such cases it has been held by some courts that, upon such retaking, the promise to pay for the goods fails, and that therefore no recovery can be had.⁴ The true defense, however, is undoubtedly that considered in an earlier action, namely, that the retaking must have been a rescission of the contract which releases both parties.⁵

II.

AS GROUND OF ACTION BY BUYER.

§ 838. Buyer may have action to recover price paid without consideration.—The objection of a want or failure of con-

Compare *Christy v. Sullivan* (1875), 50 Cal. 337, 19 Am. R. 655.

¹ See *post*, § 1332.

² *Matheny v. Mason* (1881), 73 Mo. 677, 39 Am. R. 541; *Bailey v. Foster* (1829), 9 Pick. (Mass.) 139; *Dyer v. Homer* (1839), 22 Pick. (Mass.) 253; *Hunt v. Sackett* (1875), 31 Mich. 18; *Costigan v. Hawkins* (1867), 22 Wis. 74; *Marshall v. Duke* (1875), 51 Ind. 62.

³ See *post*, § 1300.

⁴ *Minneapolis Harvester Works v. Hally* (1881), 27 Minn. 495, 8 N. W. R. 597 (but see, as to this, *Aultman v. Olson*, 43 Minn. 409, 45 N. W. R. 852); *Howe Machine Co. v. Willie* (1877), 85 Ill. 333. See also *ante*, § 620, where the cases are more fully collected.

⁵ See *ante*, § 617.

sideration may also—to anticipate somewhat matters more fully considered in a later chapter—furnish the foundation for an action by the buyer to recover the price paid. Thus, for example, if the buyer has paid the price, but the title has failed and he has been divested by the true owner;¹ or if he has paid for a patent which proves to be invalid;² or if he has paid for commercial instruments, such as notes, bonds, scrip, and the like, which prove not to be genuine,³—in these and the like cases he may recover his money as paid without consideration.

§ 839. — So, if the buyer has paid the price in advance, but has never received the goods at all;⁴ or has rejected them wholly, as he had the right to do because they were not such as the contract contemplated;⁵ or if they were not as agreed, but entirely worthless;⁶ or if the agreed article has not been delivered, but another substituted for it, and the latter has been returned,⁷—in these and similar cases there is a total failure of consideration, and the buyer may recover his money. He may likewise do so *pro tanto* where he has paid for more than he has received.⁸

¹ Eicholtz v. Bannister (1864), 17 Com. B. (N. S.) 708; Ledwich v. McKim (1873), 53 N. Y. 307; Wilkinson v. Ferree (1855), 24 Pa. St. 190.

² Darst v. Brockway (1842), 11 Ohio, 462.

³ Frank v. Lanier (1883), 91 N. Y. 112; Wood v. Sheldon (1880), 42 N. J. L. 421, 36 Am. R. 523; Thompson v. McCullough (1860), 31 Mo. 224, 77 Am. Dec. 644; Gurney v. Womersley (1854), 4 El. & Bl. 133, 82 Eng. Com. L. 132; Paul v. Kenosha (1867), 22 Wis. 256, 94 Am. Dec. 598; Terry v. Bissell (1857), 26 Conn. 23.

⁴ Nash v. Towne (1866), 72 U. S. (5 Wall.) 689; Dalton v. Bentley (1854), 15 Ill. 420; Cleveland v. Sterrett (1871), 70 Pa. St. 204.

⁵ Pope v. Allis (1885), 115 U. S. 363; Meader v. Cornell (1895), 58 N. J. L. 375, 33 Atl. R. 960.

⁶ Petersen v. Door, Sash & Lumber Co. (1883), 51 Mich. 86, 16 N. W. R. 243; Ripley v. Case (1889), 78 Mich. 126, 43 N. W. R. 1097, 18 Am. St. R. 428.

The consideration fails entirely where the seller of trees agrees to set them out and care for them, but neglects to do so, whereby they become totally worthless. Perkins v. Brown (1897), 115 Mich. 41, 73 N. W. R. 1095.

⁷ Howe Machine Co. v. Willie (1877), 85 Ill. 333.

⁸ Devaux v. Conolly (1849), 8 C. B. 640, 65 Eng. Com. L. 639; Wheadon v. Olds (1838), 20 Wend. (N. Y.) 174; Hill v. Rewee (1846), 11 Metc. (Mass.) 268; Devine v. Edwards (1877), 87 Ill. 177; (1881) 101 Ill. 138.

CHAPTER IV.

OF AVOIDANCE OF THE CONTRACT FOR MISTAKE.

§ 840. Purpose of this chapter.

841. Kinds of mistake involved.

842. Mistake which would prevent formation will justify avoidance.

843, 844. Mistake as to quality of thing sold.

845, 846. —. 1. Mistake of buyer as to quality, seller being ignorant of that mistake.

847. —. 2. Mistake of buyer as to quality, seller knowing of that mistake.

§ 848. —. 3. Mistake of buyer as to quality promised, seller not knowing of that mistake.

849, 850. —. 4. Mistake of one party as to quality promised by the other known to the latter.

851, 852. Further as to mistake of quality.

853. — Same rule in equity.

854. Effect of the mistake.

§ 840. **Purpose of this chapter.**—In a preceding chapter there has been given quite a full consideration of the question of the mistakes which will prevent the creation of the contract in the first instance,¹ but some reference to the same general subject seems desirable in this place as furnishing another of the grounds which will justify the avoidance of the assumed contract.

§ 841. **Kinds of mistake involved.**—As seen in the previous discussion, the kinds of mistake which most frequently affect the formation of the contract are: mistake as to the nature of the transaction, mistake as to the identity of the parties, mistake regarding the existence, identity, quantity, kind, quality, character or location of the thing sold, mistake respecting the terms of the contract, and mistake as to the possibility of performance.

§ 842. **Mistake which would prevent formation will justify avoidance of contract.**—It must in general be true that

¹ See *ante*, §§ 265–279.

the mistake which will operate to prevent the formation of the contract in the first instance will justify a withdrawal from it, or furnish a defense for a failure or refusal to perform it. No further statement of the principles involved is therefore necessary; but inasmuch as questions in reference to mistakes respecting the quality of the thing sold arise so frequently and give so much difficulty, it is thought that some further discussion of that aspect may be here permissible.

§ 843. Mistake as to the quality of the thing sold.—It is in respect of the quality of the thing sold that the question of mistake most frequently arises, and in considering the question the limits of the discussion must be kept constantly in mind. In actual practice the parties usually exclude question by a warranty of the quality, but the question of warranty is not here involved. There may also be representations made respecting the quality which may prove untrue, but such representations, if innocently made, constitute misrepresentation, or, if fraudulently made, constitute fraud — both of which are subjects reserved for later consideration.

§ 844. — Illustration.—The question here can be made more plain perhaps by illustrations suggested by an actual case:

A sells to B a quantity of oats. Under the circumstances old oats are worth more than new ones, but nothing is said as to the age of the oats. The oats in fact are new.

1. B thinks the oats are old ones, while A thinks they are new.

2. B thinks the oats are old ones. A knows that B thinks so, but A knows that they are new.

3. B thinks the oats are old ones, and thinks that A is selling them as old oats. A knows they are new oats, but does not know that B thinks he intends to sell them as old ones.

4. B thinks the oats are old ones, and thinks that A intends to sell them as old oats. A knows that B thinks that he (A) is selling old oats, but does not mean to do more than simply to sell the oats as oats.

Each of these cases requires separate consideration.

§ 845. — 1. **Mistake of buyer as to quality, the seller being ignorant of that mistake.**—Where the buyer is mistaken as to the quality of the thing sold, but the seller is ignorant of this mistake, and there was no warranty, there can be no question that the buyer is bound. Mr. Benjamin¹ has stated the rule thus: “Where the mistake is that of one party only to the contract, and is not made known to the other, the party laboring under the mistake must bear the consequences, in the absence of any fraud or warranty. If A and B contract for the sale of the cargo per ship Peerless, and there be two ships of that name, and A mean one ship and B intend the other ship, there is no contract.² But if there be but one ship Peerless, and A sell the cargo of that ship to B, the latter would not be permitted to excuse himself on the ground that he had in his mind the ship Peeress, and intended to contract for a cargo by this last named ship. Men can only bargain by mutual communication; and if A’s proposal were unmistakable, as if it were made in writing, and B’s answer was an unequivocal and unconditional acceptance, B would be bound; however clearly he might afterwards make it appear that he was *thinking* of a different vessel. For the rule of law is general that, whatever a man’s *real* intention may be, if he *manifests* an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as *manifested* was his *real* intention.”³

§ 846. — So Blackburn, J., in a leading case,⁴ where a quantity of oats had been sold which the buyer believed were old oats, but which in fact were new, said: “In this case I

¹ Benjamin on Sale (6th Am. ed.), § 417.

² Citing *Raffles v. Wichelhaus*, 2 H. & C. 906.

³ Citing per Lord Wensleydale in *Freeman v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, and cases collected in notes to it, 2 Sm. L. C. 803 (ed. 1887); *Cornish v. Abington*, 4 H. & N. 549; *Alexander v. Worman*, 6 H. & N. 100; *Van*

Toll v. South Eastern Ry. Co., 12 C. B. (N. S.) 75; *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584; *Carr v. London, etc. Ry. Co.*, L. R. 10 C. P. 307, per Brett, J., at p. 316.

⁴ *Smith v. Hughes* (1871), L. R. 6 Q. B. 597. In this case it appeared that plaintiff, having oats to sell, offered them by sample to the defendant through his manager. There

agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality." And Cockburn, C. J., in the same case, said: "I take the true rule to be, that where a specific article is offered for sale without express warranty, or without circumstances from which the law will imply a warranty — as where, for instance, an article is ordered for a specific purpose,— and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honor would do under such circumstances. The case of the purchase of an estate in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honor would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding."

was a bargain made for them and one lot of the oats was sent to defendant, who afterwards desired them taken back and refused to receive more on the ground that he supposed he was buying *old* oats, while these were *new*. The action was for the price of those sent and damages for not taking the remainder. Plaintiff's evidence was to the effect that the question as to the age of the oats was not raised and that he did not know that defendant never bought new oats. Defendant's

testimony was that he was a horse trainer and never bought new oats if he could get old ones; that plaintiff said the oats were old ones, and that he, defendant, supposed them to be old. "On cross-examination, witness hesitated and contradicted himself somewhat as to whether the word 'old' was used at the time of making the contract." There was also evidence that the price paid was very high for new oats, but also that oats were then very scarce.

§ 847. — 2. **Mistake of buyer as to quality, seller knowing of that mistake.**— And so though the seller knows that the buyer is mistaken as to the quality, the buyer is still bound if the seller has done nothing to deceive him. The seller is not bound to prevent the buyer from deceiving himself. Thus in the case referred to in the last section,¹ Blackburn, J., continues: “And I agree that even if the vendor was aware that the purchaser thought the article possessed that quality [age], and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.” And Cockburn, C. J., said: “Suppose a person to buy a horse without a warranty, believing him to be sound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound?”

§ 848. — 3. **Mistake of buyer as to the quality promised, seller not knowing of that mistake.**— If the parties are bound, as has been seen in the last section, where one was mistaken as to the quality and the other knew of that mistake but did nothing to cause it, then *a fortiori* must they be bound where one party is mistaken as to the quality promised, but the other is ignorant of the mistake. This is not a case of mutual mistake or of mistake as to the subject-matter, but a mistake as to the quality or attributes of an agreed chattel. In the case cited in the preceding sections,² Hannen, J., said: “It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into

¹Smith v. Hughes (1871), L. R. 6 Q. B. 597.

²Smith v. Hughes, *supra*.

an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them.¹ But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample, where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor.”²

§ 849. — 4. **Mistake of one party as to quality promised by the other, known to the latter.**— “But if in the last mentioned case,” continues Hannen, J., in the opinion quoted from in the preceding section,³ “the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality cited from Paley⁴ that a promise is to be performed ‘in that sense in which the promisor apprehended, at the time, the promisee received it,’ and may be thus expressed: ‘The promisor is not bound to fulfill a promise in a sense in which the promisee knew at the time the promisor did not intend it.’ And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall

¹ Citing *Raffles v. Wichelhaus*, 2 H.

& C. 906.

³ *Smith v. Hughes*, *supra*.

⁴ Paley, *Moral and Political Philos-*

² Citing *Scott v. Littledale*, 8 E. & ophy, book III, ch. V.

B. 815.

be fulfilled in a sense to which the mind of the promisor did not assent."

§ 850. —. Proceeding thereupon to apply this rule to the oats case under consideration, he continued: "If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent and not the real bargain."

§ 851. **Further as to mistake of quality.**—Sir Frederick Pollock, in his work on Contracts,¹ states the question now under consideration in this way: "Suppose A and B are the contracting parties; and let us denote by X a fact or state of facts materially connected with the subject-matter of the contract, which is supposed by A to exist, but which in truth does not exist, and is known by B not to exist. Then we have to ask these questions:

"1. Does A intend to contract only on the supposition that X exists? which may be put in another way, thus: If A's attention were called to the possibility of his belief in the existence of X being erroneous, would he require the contract to be made conditional on the existence of X?

"2. If so, does B know that A supposes X to exist?

"3. If B knows this, does he also know that A intends to contract only on that supposition?

§ 852. —. "If the answer to any one of these questions is in the negative," he continues, "it seems there is no binding contract. But it is to be observed that a negative answer to the second question will generally require strong evidence to establish it, and that, if this question be answered in the affirmative, an affirmative answer to the third question will often follow by an almost irresistible inference. . . . If the ques-

tions above stated be all answered in the affirmative, either by positive proof or by probable and uncontradicted presumption from the circumstances, then it may be considered either that the case becomes one of fraud, or at least that the party who knew the true state of the facts, and also knew the other party's intention to contract only with reference to a supposed different state of facts, is precluded from denying that he understood the contract in the same sense as that other, namely, as conditional on the existence of the supposed state of facts."

§ 853. — **Same rule applies in equity.**— The rule of the last section applies also in equity. Thus where, in preparing a lease, the lessor by mistake inserted a less sum as rent than that previously agreed upon, and the lessee signed and accepted the lease with knowledge, as the court found, that the lessor was laboring under the mistaken idea that the true amount was inserted, it was held that the lessor was not bound.¹ Said Sir John Romilly, M. R.: "It was certainly not a mistake committed by her [the lessee], and thereupon it is argued that there must be an end of the case, for that, to enable this court to interfere to rectify a mistake, the mistake must be mutual. But though, as a general rule, this is correct, it does not apply to every case. The court will, I apprehend, interfere in cases of mistake, *where one party to the transaction, being at the time cognizant of the fact of the error, seeks to take advantage of it.*"

§ 854. **Effect of the mistake.**— The effect of the mistake, where it has any effect at all, is to avoid the contract, at the option of the mistaken party, for he may abide by it if he so elects. If he seeks to repudiate it, he has at law two remedies. If it be executory, he may refuse performance upon the ground of the mistake; if it be executed, he may, upon putting the other party *in statu quo* — a subject to be considered in a following chapter,² — have restitution of what he has parted with.³

¹ *Garrard v. Frankel* (1862), 30 Beav. 445.

³ See *Kelly v. Solari* (1841), 9 M. & W. 54.

² See *post*, § 914.

In equity he may resist specific performance, or may proceed to have the contract set aside.¹

¹In *Webster v. Cecil* (1861), 30 price than he intended, of which the Beav. 62, specific performance of a other party must have been aware, contract for the sale of land was re- and the vendor promptly repudiated fused where the vendor, by mistake the agreement upon discovering the in addition, had inserted a smaller mistake.

CHAPTER V.

OF THE AVOIDANCE OF THE CONTRACT FOR INNOCENT MISREPRESENTATION.

<p>§ 855. What here meant by misrepresentation.</p> <p>856, 857. How misrepresentation to be distinguished from fraud.</p> <p>858. How representation to be distinguished from a term of the contract.</p> <p>859, 860. — Illustrations.</p>	<p>§ 861. — Importance of distinction.</p> <p>862. — Question for the jury.</p> <p>863. Effect of innocent misrepresentation.</p> <p>864. Innocent misrepresentation rendered fraudulent by knowingly retaining its fruits.</p>
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§ 855. **What meant by misrepresentation.**—The term “misrepresentation” is used in a variety of senses. To the popular, and to some extent to the legal, mind, it seems necessary to convey the idea of fraud, and, as will be seen in the following chapter, many misrepresentations are fraudulent, but all are not necessarily so. A misrepresentation is an untrue representation, and an untrue representation may be made in perfect innocence of a fraudulent intent, and with a firm belief at the time that the representation is true. To make a representation known to be untrue may be fraud though it was made in good faith;¹ and to make a representation as true when the maker does not know whether it is true or not may be fraud;² but the case now to be considered is that in which a person, who has no intention to deceive, makes a representation which he then believes to be true but which subsequently proves to be untrue.

§ 856. **How misrepresentation to be distinguished from fraud.**—“The practical test of fraud as opposed to misrepresentation,” says Sir W. R. Anson in his work on Contract,³ “is

¹ See *post*, § 874 et seq.

² See *post*, §§ 874–876.

³ Anson on Contract (7th ed.), 143.

that one does, and the other does not, give rise to an action *ex delicto*. Fraud is a wrong and may be treated as such, besides being a vitiating element in contract. Misrepresentation may invalidate a contract, but will not give rise to an action *ex delicto*, the action of deceit.¹ . . .

“Knowledge that a statement is false may not be inconsistent with honesty of motive in making it; on the other hand, there may be no clear knowledge that the statement made is false, but a dishonest, or at any rate self-seeking, motive for wishing that it should be believed by the party to whom it is made.”²

¹ Mr. Anson here quotes from the opinion of Cotton, L. J., in *Arkwright v. Newbold*, 17 Ch. D. 320, as follows: “It must be borne in mind that in an action for setting aside a contract which has been obtained by misrepresentation the plaintiff may succeed, though the misrepresentation was innocent; but in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with a knowledge of its being false or with a reckless disregard as to whether it is or is not true.”

² Mr. Anson here quotes from *Tindal, C. J., in Foster v. Charles*, 7 Bing. 107: “It is fraud in law if a party make representations which he knows to be false and injury ensues, although the motives from which the representations proceeded may not have been bad.” And continues: “In *Polhill v. Walter*, 3 B. & A. 114, Walter accepted a bill of exchange drawn on another person; he represented himself to have authority from that other to accept the bill, honestly believing that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act. The bill was dis-

honored at maturity, and an indorsee, who had given value for the bill on the strength of Walter's representation, brought against him an action of deceit. He was held liable, and Lord Tenterden, in giving judgment, said: ‘If the defendant, when he wrote the acceptance, and thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him for the damage sustained in consequence.’ It will be observed that in this case there was a representation of facts known to be false; that the knowledge of the untruth of the statement was the ground of the decision; it is, therefore, clearly distinguishable from a class of cases in which it has been held, after some conflict of judicial opinion, that a false representation believed to be true by the party making it will not give rise to the action of deceit,” citing *Derry v. Peek*, 14 App. Cas. 337.

“Representations made for an honest purpose, and with fair reason

§ 857. —. "It is not necessary to constitute fraud," he continues, "that there should be a clear knowledge that the statement made is false. But statements which are intended to be acted upon, if made recklessly and with no reasonable ground of belief, may furnish such evidence of dishonest motive as to bring their maker within the remedies appropriate to fraud.¹ . . .

"And so neither the intent to defraud nor deliberate assertion of untruth are necessary elements in fraud. And the best distinction which we can make between misrepresentation and fraud is that the former is a misstatement of facts not known to be false, or a non-disclosure of facts not intended to deceive; while the latter consists in representations known to be false, or made with no real belief in their truth or falsehood, and entitles the original party to the action of deceit."

§ 858. **How representation to be distinguished from a term of the contract.**— The misrepresentation which may be thought to affect the contract may have been made under any of a variety of circumstances or at any of a variety of times. The most important distinction is whether the representation is or is not a part of the contract. For, 1. A representation may be made prior to the making of a contract and not as any part of that contract, but rather as an inducement to the making of it; or, 2. The representation, whether made prior to or contemporaneously with the making of the contract, may have been intended by the parties to be a *term* of the contract and to constitute a part of it.

for believing them to be true, are not fraudulent, although it may turn out that they were not true." *Lewark v. Carter* (1888), 117 Ind. 206, 20 N. E. R. 119, 10 Am. St. R. 40, citing *Furnas v. Friday*, 102 Ind. 129, 1 N. E. R. 296; *Watson Coal, etc. Co. v. Casteel*, 68 Ind. 476.

¹ Mr. Anson here refers to *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64, saying: "Where directors

issue a prospectus setting forth the advantages of an undertaking into the circumstances of which they have not troubled themselves to inquire, intending to induce those who read the prospectus to incur liabilities in respect of the undertaking, they commit a fraud if the statements contained in the prospectus turn out to be untrue; they represent themselves to have a belief

§ 859. — **Illustrations.**— For example: A says to B one day, "I have a fine, sound horse for sale. Come around to my stable some time and look at it." On a later day B goes to A's stable, examines the horse and buys it, without any reference to the previous conversation and without any further statement whatever as to the soundness of the horse. A, in good faith, believed the horse to be sound, but it proves to have been, in fact, unsound at and since the first conversation. Has B any remedy against A? The answer may be suggested by reference to a case in Minnesota.¹ The action was upon an alleged warranty by the defendant on the sale of a span of horses to the plaintiff. The plaintiff alleged "that at the time of such purchase, and before the same was made, one of the said horses was affected with what defendant said was a cold, which caused said horse to discharge at the nose; *that before this plaintiff bought said horse* the defendant told him, the plaintiff, that nothing ailed said horse but a cold, and that it was only such cold that caused the said horse to discharge from the nose as aforesaid." Plaintiff also alleged that he relied upon such statement and was thereby led to purchase the horses, and that the horse in question, in fact, then had the glanders, from which he afterwards died.

§ 860. — In speaking of the sufficiency of this evidence the court said: "It is not only not such that, if submitted to a jury without any other evidence, they would be bound to find a contract of warranty, but it is such that a jury could not, from it, find such a contract; for it does not appear under what circumstances, nor, except that it was before the sale, at what time defendant told plaintiff what is stated in the complaint. It is not stated that it was during the negotiations for the sale, or in any way connected with them, or with a view to a sale, or to induce the plaintiff to buy. None of the cir-

which they know they do not possess." Minn. 383, 10 N. W. R. 416; Hopkins v. Tanqueray (1854), 15 Com. B. 130

¹ Zimmerman v. Morrow (1881), 28 Minn. 367, 10 N. W. R. 139. See also 80 Eng. Com. L. 129, and the discussions in the chapter on Warranty, Torkelson v. Jorgenson (1881), 28 *post*, §§ 1224 *et seq.*

cumstances under which the words were spoken are stated so that it may be known whether they were intended and were understood as merely expressing an opinion, or as indicating that the defendant undertook or contracted that the horse had nothing more than a cold. The fact alleged, that plaintiff was led to purchase the horses by the representation, does not alter the case; for, there being no fraud, he had no right to rely upon it in making the purchase, unless it was made in such a manner and under such circumstances as gave him a right to understand that defendant intended to be bound by it as a part of the contract of sale."

§ 861. — **Importance of distinction.**—To distinguish between those representations which are and those which are not terms of the contract is a matter of importance, because, as has been clearly pointed out both by Sir Frederick Pollock¹ and Sir W. R. Anson² in their respective works on Contract, it must be borne in mind, "first, that a representation which is embodied in a contract ceases to be a representation and becomes a promise that a certain thing is or shall be; and next, that, unless a representation is so embodied, it cannot of itself confer any right of action with a view to its realization."

If the representation be found to be a term of the contract, "it receives the name of a condition³ or a warranty,⁴ and its untruth does not affect the *formation* of the contract, but operates to *discharge* the injured party from his obligation, or gives him a right of action *ex contractu* for loss sustained by the untruth of a statement which is regarded in the light of a promise."⁵

¹ Pollock on Contract (4th ed.), 480 et seq.

² Anson on Contract (7th ed.), 146.

³ As to this, see *post*, § 1218.

⁴ As to this, see *post*, § 1231.

⁵ Anson on Contract, *ubi supra*.

This question was fully discussed in the leading case of *Behn v. Burness* (1863), 1 B. & S. 877. 3 id. 751, where a charter was entered into

that Behn's ship, then in the port of Amsterdam, should proceed to Newport for a cargo of coal. At the time of the contract the ship was not at Amsterdam, and did not arrive there until four days later. When she reached Newport, Burness repudiated the contract, and the question was whether the words now in the port of Amsterdam amounted to a condi-

§ 862. — **Question for the jury.**— Whether the assertion made was, under the circumstances, a mere representation, or was designed to be a term of the contract and thus to consti-

tion the breach of which gave him a right to repudiate the contract or only gave him a right of action after he had performed the contract. It was held that the former was the true construction. Said Williams, J.: "Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and consequently the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. (See *Elliott v. Von Glehn*, 13 Q. B. 632; *Wheelton v. Hardisty*, 8 E. & B. 232.)

"If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree perhaps sanctioned by judicial authority (see *Barker v. Windle*, 6 E. & B. 675, 680), that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, the misrepresentation is so gross as to amount to sufficient evidence of fraud, it is

obvious that the contract would on that ground be voidable.

"The representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court, and not the jury, must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

"In the construction of charter-parties, this question has often been raised with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition (see *Glaholm v. Hays*, 2 M. & G. 257; *Oliver v. Fielden*, 4 Exch. 135; *Croockewit v. Fletcher*, 1 H. & N. 893; *Seeger v. Duthie*, 8 C. B. N. S., 45), while a stipulation that she shall sail with all convenient speed,

tute a condition or a warranty, is, where the facts are in dispute, a question for the jury.¹

§ 863. Effect of innocent misrepresentation.—The rule respecting such misrepresentations as are being here considered has been said to be that a misrepresentation, not fraudulent and

or within a reasonable time, has been held to be only an agreement. (See *Tarrabochia v. Hickie*, 1 H. & N. 183; *Dimech v. Corlett*, 12 Moo. P. C. C. 199; *Clipsham v. Vertue*, 5 Q. B. 265.) But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages (see *Ellen v. Topp*, 6 Exch. 424-441; *Graves v. Legg*, 9 Exch. 709-716, adopting the observations of Serjt. Williams on the case of *Boone v. Eyre*, 1 H. Bl. 273, in note *a* in 1 Saund. 320*d* (6th ed.); *Elliott v. Von Glehn*, 13 Q. B. 632). Accordingly, if a specific thing

has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken, unless there is a special stipulation to that effect in the contract (see *Bannerman v. White*, 10 C. B., N. S., 844); but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. Still if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages."

¹*Kinley v. Fitzpatrick* (1839), 4 How. (Miss.) 59, 34 Am. Dec. 108; *Morrill v. Wallace* (1837), 9 N. H. 111; *Baum v. Stevens* (1842), 2 Ired. (N. C.) 411; *Foggart v. Blackweller* (1844), 4 Ired. 238; *House v. Fort* (1837), 4 Blackf. (Ind.) 293; *Bradford v. Bush* (1846), 10 Ala. 386.

not a term of the contract, or (except in certain cases not here material, sometimes designated contracts *uberrimæ fidei*)¹ an innocent concealment of the truth, is not, at law, a ground for the avoidance of the contract, nor does it give rise to an action for damages,² though there is, on the part of the common-law courts, a strong tendency "to bring any statement which was

¹These are contracts of marine, life and fire insurance, contracts for the sale of lands, for family settlements, for the allotment of shares in companies, and, according to some authorities, contracts of suretyship and partnership. See Anson on Contract (7th ed.), 157; Pollock on Partnership (4th ed.), 486.

²Anson on Contract (7th ed.), 150.

On the contrary, see Holcomb v. Noble (1888), 69 Mich. 396, 37 N. W. R. 497. The action here was an action on the case for misrepresentation of the value and quality of certain lands. The representations were made by defendant Noble as the judgment of a third person whom he had employed to examine the lands. The representations were not true in fact, but the defense was that they were made in good faith in ignorance of their untruth. Two of the judges held this no defense, and the two others concurred grudgingly on the ground that it was the settled rule in Michigan. Speaking for these two, Morse, J., said: "I was strongly impressed upon the argument of this case with the theory of the defendant, supported by abundant authority outside of our own State, that unless the jury found that the representations relied upon by the plaintiff as false were made by the defendant knowing them to be false, or he made the statements as facts within his own knowledge when he was ignorant of the truth or falsity of

them, he could not be held liable in this action: that if he told plaintiff that he had never seen the land, but that he had had the same examined by a competent land-looker, who said that there were five million feet of pine on the land, and made no representations as of his own knowledge, the plaintiff could not recover.

"A subsequent careful examination of the case, and the authorities cited by defendant's counsel, has but confirmed me in the correctness and justness of his claim. I am satisfied that the law ought not to make a different contract for the seller than he sees fit to make for himself, and hold him, in effect, for warranties that he never made.

"But an equally careful examination of the cases adjudicated in this State satisfies me that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequence to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity. *Baughman v. Gould*, 45 Mich. 481, 8 N. W. R. 73; *Converse v. Blumrich*, 14 Mich. 109; *Steinbach v. Hill*, 25 Mich. 78; *Webster v. Bailey*, 31 Mich. 36; *Starkweather v. Benjamin*, 32 Mich. 305; *Beebe v. Knapp*, 28 Mich. 53."

See also the fuller discussion of

material enough to affect consent, if possible, into the terms of the contract.”¹

In the courts of equity, however, a material misrepresentation, though not fraudulent, may defeat an action for specific

this question in the following chapter on Avoidance of the Contract for Fraud.

¹ Anson on Contract (7th ed.), 150, citing as illustration, *Bannerman v. White*, 10 C. B. (N. S.) 844. Of this case Mr. Anson says: “Bannerman offered hops for sale to White. White asked if any sulphur had been used in the treatment of that year’s growth. Bannerman said ‘no.’ White said he would not even ask the price if any sulphur had been used. They then discussed the price, and White ultimately purchased by sample the growth of that year; the hops were sent to his warehouse, were weighed, and the amount due on their purchase was then ascertained. He afterwards repudiated the contract on the ground that sulphur had been used in the treatment of the hops. Bannerman sued for their price. It was proved that he had used sulphur over five acres, the entire growth consisting of three hundred acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made as to the use of sulphur was not wilfully false, and they further found that ‘the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff.’ The court had to consider the effect of this finding, and came to the conclusion that the

representation of the plaintiff was a part of the contract and a preliminary condition, the breach of which entitled the defendant to be discharged from liability.

“Erle, C. J., said: ‘We avoid the term *warranty* because it is used in two senses, and the term *condition* because the question is whether that term is applicable. Then, the effect is that the defendants required, and that the plaintiff gave his *undertaking*, that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted, and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

“‘The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used; and upon this ground we agree that the rule should be discharged.’

“It should be noted that in this case the representation was made before the parties commenced bargaining; whereas the representation

performance, or "may give a right to avoid or rescind a contract where capable of such rescission."¹

§ 864. Innocent misrepresentation made fraudulent by knowingly retaining its fruits.—But though the misrepresentation was not originally fraudulent, it may, it is said, be made

in *Behn v. Burness* was actually a term in the charter-party.

"It should further be noted that the actual legal transaction between the parties was an executory contract of sale by sample of a quantity of hops, a contract which became a bargain and sale, so as to pass the property when the hops were weighed and their price thus ascertained. There was nothing in the contract of sale to make the acceptance of the hops conditional on the absence of sulphur in their treatment; and the language of Erle, C. J., shows that he felt it difficult to apply the terms '*condition*' or '*warranty*' to the representation made by the plaintiff.

"The undertaking," he says, "was a preliminary stipulation;" and clearly the court felt that its introduction into the contract was only to be effected by an extension of the terms of the contract so as to include the discussion preliminary to the bargain. What really happened was that Bannerman made a statement to White, and then the two made a contract which did not include this statement, though but for the statement the parties would never have entered on a discussion of terms. The truth was that the consent of the buyer was obtained by a misrepresentation of a material fact, and was therefore unreal, but the common-law courts had precluded themselves from giving any

effect to a representation unless it was a term in the contract, and so in order to do justice they were compelled to drag into the contract terms which it was never meant to contain."

¹ Per Bramwell, J., in *Derry v. Peek* (1889), L. R. 14 App. Cas. 337, 347. Equity may rescind contract of sale of chattel for material false representation by buyer, though he was not aware that his statement was false. *Newman v. Claffin* (1899), 107 Ga. 89, 32 S. E. R. 943.

In *Grosh v. Ivanhoe Land Co.* (1897), 95 Va. 161, 27 S. E. R. 841 (a land case), it is said: "A false representation of a material fact constituting an inducement to the contract, on which the party had a right to rely, is a ground for rescission of the contract by a court of equity, although the party making the representation was ignorant whether it was true or false. The real inquiry is not whether the party making the representation knew it to be false, but whether the other party believed it to be true, and was misled by it in making the contract; and, whether the misrepresentation is made innocently or knowingly, the effect is the same."

In *Brooks v. Hamilton* (1870), 15 Minn. 26 (a land case), it is said: "It is true that 'an innocent misrepresentation by mistake can never be made the ground of a personal action for fraud,' but it may operate upon the contract itself to such an extent

so by knowingly retaining the benefits accruing from it. "For it is a settled rule," says the court of appeals of Kentucky in a recent case,¹ "that even when one, who brings about a contract by misrepresentation, commits no fraud, because his rep-

that a court of equity will rescind the contract; but that will only be the case when the error between the parties is of such a nature and character as to destroy the consent necessary to the validity of the contract, and the rule is further qualified so that it embraces only cases to which the rule *caveat emptor* does not apply."

In *Wilcox v. Iowa Wesleyan University* (1871), 32 Iowa, 367 (a land case), it is said that "even if by mistake, and innocently, a party misrepresents a material fact, upon which another party is induced to act, it is as conclusive a ground of relief in equity as a wilful and false assertion."

In *Frenzel v. Miller* (1871), 37 Ind. 1 (a case of the sale of a chattel), it is said, speaking of the rules prevailing before the adoption of the code of procedure: "The courts of equity would afford relief by reforming or rescinding a contract founded upon a mutual mistake of fact upon a material matter, although the representation was innocently made by mistake; while the courts of law would afford no remedy, in the absence of a warranty, unless there was either positive or constructive fraud." But since the code, it is said, this distinction no longer prevails and the equitable defenses may be availed of in actions which formerly would have been legal in form.

In *Redgrave v. Hurd* (1881), 20 Ch. Div. 1 (an action for specific performance), the same distinction between the rules at law and in equity, and

the effect of the Judicature Act, were stated by Jessel, M. R., as follows: "As regards the rescission of a contract, there was no doubt a difference between the rules of courts of equity and the rules of courts of common law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of courts of equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. . . . As regards the rule of common law there is no doubt it was not quite so wide. There were, indeed, cases in which, even at common law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care whether it was true or false, and not with the belief that it was true."

¹ *Prewitt v. Trimble* (1891), 92 Ky. 176, 17 S. W. R. 356, 36 Am. St. R. 586. But in this case the court held that the defendant had at least constructive knowledge of the falsity of his statements. It was an action for the rescission of a sale of bank stock induced, as plaintiff claimed, by false representations concerning its condition made by the defendant, who was

resentation was, when made, innocent in the ordinary sense, still, if when the fact of its falsity becomes known he refuses to relinquish the advantage, upon offer, of reciprocal relinquishment received, by the injured party, it would make him guilty of constructive fraud, and the contract subject to rescission by a court of equity."

its president. "In this case," said the court, "not the bank, but appellee personally, profited by the bargain appellant was induced by the false report or statement of its condition to make with him; and therefore it would be contrary to reason and justice for him to be permitted to enjoy the benefits of it at the expense of appellant upon the flimsy ground of ignorance about the material matters in reference to which he made the deliberate and positive represen-

tation. For leaving out of view the question whether he did, in fact, know that the statement was untrue, being in a situation to know, and where it was his duty to know, he, in contemplation of law, did know it, and, consequently, such statement is to be held fraudulent and appellant has a remedy for the loss sustained, either by action in damages or for rescission." Then follows the statement quoted in the text.

CHAPTER VI.

OF THE AVOIDANCE OF THE CONTRACT FOR FRAUD.

§ 865. Purpose of this chapter.

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| <p>§ 973. — What subsequent creditors may avoid.</p> <p>974. — Where creditors of both classes.</p> <p>975. — Subrogation of subsequent to rights of existing creditors.</p> <p>976. — Creditors with notice.</p> <p>977. <i>Bona fide</i> purchasers from fraudulent grantee.</p> <p>978. Fraudulent conveyance not good as security for amount paid.</p> <p>V. OF FRAUD UPON SUBSEQUENT PURCHASERS.</p> <p>979. In general.</p> | <p>§ 980, 981. Delivery as a requisite to the transfer of the title.</p> <p>982. — Reasons for rule.</p> <p>983. Retention of possession by seller as a badge of fraud.</p> <p>984. — Conclusiveness of presumption.</p> <p>985. — Statutory provisions.</p> <p>986. What delivery suffices.</p> <p>987, 988. — Illustrations.</p> <p>989. — Delivery of documents.</p> <p>990, 991. — Seller as bailee of buyer.</p> <p>992. Who are purchasers.</p> |
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§ 865. **Purpose of this chapter.**— In the preceding chapter there has been considered the effect, as to the avoidance of the contract, of representations which were untrue in fact, but which were made without any intention to deceive. Passing from these innocent misrepresentations, there is next to be considered the case in which the misrepresentation was not innocent,—a case to which the term “fraud” is usually applied. It will be considered, first, as respects its general aspect, and then as it applies particularly to the seller and purchaser of the chattels, and finally as it respects creditors and vendees of the seller.

I.

OF FRAUD IN GENERAL.

§ 866. **Definition of fraud.**— Many definitions of fraud have been attempted with varying success, but that of Sir William Anson may be adopted as best suited to the present purpose: Fraud is a false representation of facts, made with a knowledge of its falsehood, or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.¹

¹ Anson on Contract (7th ed.), 165.

It is not necessary here to go extensively into an analysis of this definition, as that is fully done by the leading writers upon contract, but the chief features of the question may be touched upon with special reference to the subject now in hand. Thus —

§ 867. **Must be false representation.**— In the first place there must be *false representation*,— not necessarily false *statement*, but a false appearance given to the fact. The method employed is immaterial. “It does not matter whether the representation is made by express words, or by conduct, nor whether it consists in the positive assertion or suggestion of that which is false, or in the active concealment of something material to be known to the other party for the purpose of deciding whether he shall enter into the contract.”¹

§ 868. — **Whether concealment of truth is equivalent to false representation.**— The concealment which shall amount to a false representation is that only which may properly be designated as *active*. Mere passive non-disclosure which, as has been seen, may suffice to vitiate a contract *uberrimæ fidei*, will not be sufficient here; “there must be an active attempt to deceive, either by a statement which is false or which is true so far as it goes, but is accompanied with such a suppression of facts as to convey a misleading impression.”² “There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false.”³ Thus, where one, seeking credit, being asked “how he stood,” correctly stated his means, but did not mention that he owed two-thirds as much as he had, the court said: “To tell half a truth only is to conceal the other half. Concealment of this kind, under the circumstances, amounts to a false representation.”⁴ But it has been held that

¹ Pollock on Contract (4th ed.), 513.

⁴ Newell v. Randall (1884), 32 Minn.

² Anson on Contract (7th ed.), 166. 171, 19 N. W. R. 972, 50 Am. R. 562.

³ Per Lord Cairns, in Peek v. Gurney, L. R. 6 H. L., at p. 403. So where a trader had made statements respecting his financial stand-

the mere failure to answer a question relating to a matter concerning which one party had important information is not equivalent to a misrepresentation.¹

ing to a commercial agency for the purpose of gaining credit, and subsequently, when his financial condition had greatly changed, bought more goods without notifying the agency of the change, it was held to be such a false representation as entitled the seller to rescind. *Mooney v. Davis* (1889), 75 Mich. 188, 42 N. W. R. 802, 13 Am. St. R. 425. See also *Croyle v. Moses*, 90 Pa. St. 250, 35 Am. R. 654; *Kenner v. Harding*, 85 Ill. 264, 28 Am. R. 615; *Graham v. Stiles*, 38 Vt. 578; *Wheeler v. Wheelock*, 34 Vt. 553, and other cases more fully stated *post*, in notes to § 894.

"To represent untruly that a glandered horse had the distemper only, or to conceal the fact that he had glanders, would be as much a *suggestio falsi* and *suppressio veri* as to represent an unsound horse as sound, or as to conceal the unsoundness." *George v. Johnson*, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288.

The rule is well stated by Mr. Justice Gray in *Stewart v. Wyoming Ranch Co.* (1888), 128 U. S. 383, 388, 9 S. Ct. 101, as follows: "In an action of deceit it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aluid est tacere, aluid celare*; a sup-

pression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

In *Ennis v. Borner* (1900), 40 C. C. A. 249, 100 Fed. R. 12, it appeared that the seller sold three cargoes of ore, to be paid for in accordance with an analysis to be made by one of two chemists to be selected by the seller. Instead of making the selection, the seller requested the buyer to make the selection and notify seller. The buyer made no selection, but, on the arrival of first cargo, had the ore analyzed by both chemists, and sent to the seller the one most favorable to the buyer, with a draft in pay-

¹ *Laidlaw v. Organ*, 2 Wheat. (U. S.) 178. This was a contract for the sale of tobacco. On the morning of the sale the buyers knew, but the sellers did not know, that peace had been concluded between the United States and England, and this enhanced the

price. The sellers asked if there was any news affecting the market price. The buyers gave no answer and the sellers did not insist on having one. *Held*, that their silence did not amount to a fraudulent concealment. See criticism, Story, Eq. Jur., § 149.

§ 869. — Concealment of latent defects — Caveat emptor.

As has been seen, one party to the contract is not, as a general rule, bound to see to it that the other does not deceive himself, but he is bound not to aid in that deception.¹ *Caveat emptor* is the usual rule, and the seller of goods is not bound, under ordinary circumstances, to point out defects in his wares, though he is bound not to represent, either by act or implication, that such defects do not exist. In the case of latent defects, not discoverable upon ordinary observation, some difficulty exists. The question has been confused by association with cases, hereafter to be considered, in which there is an implied warranty, as in the case of sales of goods for a particular purpose and the sale of articles for food. In an action for fraud or deceit, however, the question becomes one of knowledge on the part of the seller which he fails to communicate to the buyer. It certainly cannot be fraud or deceit to sell an article having a secret defect of which the seller is ignorant. Whether the seller is bound to point out defects, known to him but not discoverable by the usual examination, which if known to the seller would deter him from buying, is a question upon which the authorities are not agreed; but the weight of authority, in this country at least, is that to intentionally conceal such a defect is a fraud upon the buyer.² Where the defect is of a nox-

ment on that basis, which the seller accepted. The same course was pursued on the arrival of the other cargoes; but the analysis was so unfavorable to the seller that he asked to have the ore resampled, but the buyer told him that it had been so mixed with other ore that this was impossible. The buyer sold the ore in accordance with the other chemist's analysis, which made the ore of better grade, but he at no time informed the seller that such an analysis had been made. *Held*, that he was bound in good faith to report both analyses, and, having concealed the second, the acceptance of the

first by the seller was not such an acceptance as precluded his recovery of the price according to the second.

¹ See *Smith v. Hughes*, L. R. 6 Q. B. 597, cited *ante*, § 846.

² That the vendor is *not* bound to disclose secret defects, see *Beninger v. Corwin* (1854), 24 N. J. L. 257; *Peek v. Gurney* (1873), L. R. 6 H. L. 377.

There are many cases which hold otherwise. In Missouri a failure to disclose a latent defect, known to the seller and not to the buyer, and of such a character that, if known, the buyer would not have purchased, is a fraudulent concealment. *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alex-*

ious character, the authorities in this country are pronounced upon the duty of the seller to disclose his knowledge of it.¹

§ 870. Must be present representation and not mere promise as to future.—In the next place, there must be a representation concerning a present or past condition, and not a mere promise as to the future.² As is said in a recent case: “A representation, in order that, if material and false, it may form

ander, 27 Mo. 530; *Grigsby v. Stapleton* (1887), 94 Mo. 423, 7 S. W. R. 421. *Paddock v. Strobbridge* (1857), 29 Vt. 470, is also in the same line, though the court finally leave the question open. [They rely on the English cases of *Mellish v. Motteux*, Peake, 115; *Bruce v. Ruler*, 2 Man. & Ry. 3, and *Hill v. Gray*, 1 Stark. 434. But the first and last of these cases at least are of doubtful authority upon the point of mere concealment. See as to *Hill v. Gray*: *Keates v. Lord Cadogan* (1851), 10 C. B. 591; *Peek v. Gurney* (1873), L. R. 6 H. L. 377. As to *Mellish v. Motteux*, see *Baglehole v. Walters*, 3 Camp. 154; *Pickering v. Dowson*, 4 Taunt. 779.] In *Hughes v. Robertson* (1824), 1 T. B. Mon. (Ky.) 215, 15 Am. Dec. 104, it was held fraud for a seller to fail to disclose that the horse which he was selling was blind when this was not apparent to the purchaser. To like effect: *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. R. 552. In *Maynard v. Maynard* (1877), 49 Vt. 297, a man sold a bull which he knew was being bought for breeding purposes and which he knew was impotent, but he did not disclose the defect. Held, to be fraudulent concealment. It is fraud in the seller of commercial paper not to disclose the sudden and recent failure of the makers. *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404.

In *Hoe v. Sanborn* (1860), 21 N. Y.

552, 78 Am. Dec. 163, it is said: “It is a universal doctrine, founded upon the plainest principles of natural justice, that, whenever the article sold has some latent defect, which is known to the seller, but not to the purchaser, the former is liable for this defect if he fails to disclose his knowledge on the subject at the time of the sale.” See also *post*, § 935.

¹ In *Grigsby v. Stapleton* (1887), 94 Mo. 423, 7 S. W. R. 421, it was held fraudulent concealment to sell cattle known to be infected with Texas fever, and not to disclose that fact. To same effect: *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658; *George v. Johnson*, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288. In *French v. Vining* (1869), 102 Mass. 132, 3 Am. R. 440, it was held fraudulent concealment to sell hay which the seller knew had been exposed to poison without disclosing that fact. See also *post*, § 935.

² *Knowlton v. Keenan* (1887), 146 Mass. 86, 15 N. E. R. 127, 4 Am. St. R. 282; *Dawe v. Morris* (1889), 149 Mass. 188, 21 N. E. R. 313, 14 Am. St. R. 404, 4 L. R. A. 158; *Lawrence v. Gayetty* (1889), 78 Cal. 126, 20 Pac. R. 382, 12 Am. St. R. 29; *Nounnan v. Land Co.* (1889), 81 Cal. 1, 22 Pac. R. 515, 6 L. R. A. 219; *Chicago, etc. Ry. Co. v. Titterington* (1892), 84 Tex. 218, 31 Am. St. R. 39, 19 S. W. R. 472; *Harlington v. Rutherford*, 38 Fla. 321, 21 S. R. 283.

the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character, that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon.”¹

§ 871. Must be representation as to facts and not mere expression of opinion.—The representation must also be of an existing fact and not the mere expression of an opinion. Thus, representations concerning the value or worth of an article, the goodness of a security, the profitableness of a contemplated investment, and the like, are mere expressions of opinion, and neither vitiate a contract nor give rise to an action for damages.² And, as will be seen, the same rule applies even though the opinion was given with a knowledge of its unsoundness and for the purpose of deceiving the other party, unless there is a want of knowledge by the other party who relies entirely upon the opinion, or unless some artifice is employed to prevent his inquiry or his discovery of the truth.³

§ 872. Must be representation of fact and not of law.—The representation must also be one of fact as distinguished from one of law. In the leading case upon the subject it is said by the supreme court of the United States,⁴ quoting from the supreme court of Illinois:⁵ “A representation of what the law

¹ *Dawe v. Morris*, *supra*.

³ See *post*, § 936.

² See *Esterly Harvesting Mach. Co. v. Berg*, 52 Neb. 147, 71 N. W. R. 952; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. R. 623; *Evans v. Gerry*, 174 Ill. 595, 51 N. E. R. 615; *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665; *Reeves v. Corning*, 51 Fed. R. 774.

⁴ *Upton v. Tribilcock* (1875), 91 U. S. 45.

The question of the effect of representations concerning *value*, *cost*, *offers*, and the like, is more fully considered *post*, § 936.

⁵ *Fish v. Cleland*, 33 Ill. 237. To same effect: *Lehman v. Shackelford*, 50 Ala. 437; *Beall v. McGehee*, 57 Ala. 438; *Grant v. Grant*, 56 Me. 573; *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. R. 357; *Smither v. Calvert*, 44 Ind. 242; *Gormely v. Gymnastic Ass'n*, 55 Wis. 350,

will or will not permit to be done is one on which the party to whom it is made has no right to rely; and, if he does so, it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an *opinion* in regard to the law and is always understood as such."

The same rule applies ordinarily to representations concerning the legal effect of instruments or transactions.¹

§ 873. — But while these principles are appropriate enough where the parties are dealing at arm's length with each other, the relation or situation of the parties may modify the result. Thus it is said: "Notwithstanding a misrepresentation as to a matter of law does not, *per se*, constitute a fraud, yet other circumstances, concurring with such misrepresentation, may make it a fraud. If any peculiar relationship of trust or confidence existed between the parties, and the plaintiff has availed himself of such trust or confidence to mislead the defendant, by a misrepresentation as to the legal effect of the contract, it would constitute a fraud. So, if the defendant was in fact ignorant of the law, and the other party, knowing him to be so, and knowing the law, took advantage of such ignorance to mislead him by a false statement of the law, it would constitute a fraud."²

§ 874. — **Representation must be material.**— The representation which shall affect the contract or give rise to an action for damages must be one concerning facts material to

13 N. W. R. 242; Jaggard v. Winslow, 30 Minn. 263, 15 N. W. R. 242; Champion v. Woods, 79 Cal. 17, 12 Am. St. R. 126, 21 Pac. R. 534.

This rule does not apply to representations concerning the law of another State or country. Wood v. Roeder, 50 Neb. 476, 70 N. W. R. 21.

¹ *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Clem v. Newcastle R. Co.*, 9 Ind. 488, 68 Am. Dec. 653.

Representations regarding the va-

lidity of a patent must ordinarily be regarded as mere expressions of opinion as to legal effect. *Reeves v. Corning*, 51 Fed. R. 774. So, that a patent is valid and "covers broadly" certain points. *Huber v. Guggenheim*, 89 Fed. R. 598.

² *Townsend v. Cowles* (1858), 31 Ala. 428. To like effect: *Lamb v. Lamb*, 130 Ind. 273; *Kline v. Kline*, 57 Pa. St. 120.

the transaction. It must be a representation to the complaining party "of material facts calculated to deceive him and induce him to act. Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient."¹ "To avoid a contract for false representations, the representations must relate distinctly and directly to the contract, must affect its very essence and substance, and must be material to the contract. If the representations relate to other matters, or to the contract in a trivial and unimportant respect only, or are wholly collateral, they afford no ground for avoiding the contract."²

§ 875. Representation must have been made with knowledge of its falsity or without belief in its truth.— And, again, the representation must have been made either with knowledge of its falsity, or, at any rate, without belief in its truth. Some statements of the rule do indeed go further than this,³ and treat, as fraudulent, assertions made by a person as true which he does not know and has no reasonable ground to believe to be

¹Per Morton, C. J., in *Hedden v. Griffin* (1884), 136 Mass. 229, 49 Am. R. 25. To same effect: *Dawe v. Morris* (1889), 149 Mass. 188, 21 N. E. R. 313, 14 Am. St. R. 404, 4 L. R. A. 158; *Williams v. McFadden* (1887), 23 Fla. 143, 1 S. R. 618, 11 Am. St. R. 345; *McGar v. Williams* (1855), 26 Ala. 469, 62 Am. Dec. 739; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283.

²Per Start, J., in *Stone v. Robie* (1894), 66 Vt. 245, 29 Atl. R. 257, citing *Long v. Woodman*, 58 Me. 49; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 259, 39 Am. Dec. 726; *Clem v. Newcastle, etc. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653; *Wight v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

³Thus in *Massachusetts, in Chat-ham Furnace Co. v. Moffatt* (1888),

147 Mass. 403, 18 N. E. R. 168, 9 Am. St. R. 727, C. Allen, J., said: "It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge,

true; but the rule has been settled for the English courts, in the great case of *Derry v. Peek*, in accordance with what is believed to be the weight of authority, that, to sustain an action for deceit, actual fraud must be shown.

or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles. *Cole v. Cassidy*, 138 Mass. 437, 52 Am. R. 284; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Milliken v. Thorndike*, 103 Mass. 382; *Fisher v. Mellen*, 103 Mass. 503; *Stone v. Denny*, 4 Metc. 151; *Page v. Bent*, 2 Metc. 371; *Hazard v. Irwin*, 18 Pick. 95." See also *Goodwin v. Massachusetts Loan Ass'n*, 152 Mass. 189, 202.

In **Connecticut** the Massachusetts rule, as laid down in the *Chatham Furnace Co.'s case*, *supra*, is cited with approval. *Scholfield Gear & Pulley Co. v. Scholfield* (1898), 71 Conn. 1, 40 Atl. R. 1046.

In **Maine** the Massachusetts rule is approved. *Braley v. Powers*, 92 Me. 203, 42 Atl. R. 362.

In the **United States** supreme court it is said that "a statement recklessly made without knowledge of its truth was a false statement knowingly made" (*Cooper v. Schlesinger* (1883), 111 U. S. 148); and that "a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representation, to one who believes and

acts upon them, as if he had actual knowledge of their falsity." *Lehigh Zinc & Iron Co. v. Bamford* (1893), 150 U. S. 665.

In **Oregon** it is said that false representation made recklessly as of one's own knowledge, without knowing whether it was true or not, is fraudulent. *Cawston v. Sturgis*, 29 Ore. 331, 43 Pac. R. 656.

In **Missouri** it is said: "A distinct, wilful statement, in ignorance of the truth, is the same as the statement of a known falsehood, and will constitute *scienter*." *Walsh v. Morse* (1883), 80 Mo. 568. *Cf. Dulaney v. Rogers*, 64 Mo. 201; and see *Bank of Atchison v. Byers*, 139 Mo. 627, 41 S. W. R. 325, where *Derry v. Peek* is cited with approval.

In **Wisconsin** it is said that "it makes no difference whether the misrepresentations are wilful. The seller is bound to know that the representations which he makes to induce the sale of his property are true." *Beetle v. Anderson* (1897), 98 Wis. 5, 73 N. W. R. 560, citing *Miner v. Medbury*, 6 Wis. 295; *Cotzhausen v. Simon*, 47 Wis. 103; *Montreal River L. Co. v. Mihills*, 80 Wis. 540; *Gunther v. Ullrich*, 82 Wis. 222.

In **Nebraska** it is said: "It is the settled law of this State that to entitle a party to relief on the ground of false representations, it is not necessary for him to allege or prove that the party making them at the time knew they were false; in other words, whether the defendant acted in good faith or not is immaterial."

§ 876. — **Derry v. Peek.**— “To believe without reasonable grounds,” said Lord Bramwell, “is not moral culpability, but (if there is such a thing) mental culpability.” And Lord Herschell said: “I think the authorities establish the following

Field v. Morse (1898), 54 Neb. 789, 75 N. W. R. 58, citing *Phillips v. Jones*, 12 Neb. 213; *Foley v. Holtry*, 43 Neb. 133; *Hoock v. Bowman*, 42 Neb. 80; *Johnson v. Gulick*, 46 Neb. 817.

In Texas it is said that if the representations are intended to and do influence the other party's conduct, the party making them should “be held responsible for their verity, if they should prove false, no matter how innocently made or honestly believed.” *Loper v. Robinson* (1881), 54 Tex. 510.

In **Minnesota** the Massachusetts cases are cited with approval, though the court finally put the rule upon substantially the same ground as the English rule, saying: “It is fraudulent to affirm what is false, knowing it to be false. It is equally as fraudulent to affirm what is false, *knowing* that the affirmation is of the existence of a fact about which one is in entire ignorance.” *Bullitt v. Farrar* (1889), 42 Minn. 8, 43 N. W. R. 566, 18 Am. St. R. 485, citing *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Wilder v. De Cou*, 18 Minn. 471. See also *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. R. 360; *Riggs v. Thorpe*, 67 Minn. 217, 69 N. W. R. 891.

In **Michigan** the rule is said to be settled, contrary to “abundant authority outside of our own State,” “that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though

it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity.” Per *Morse, J.*, in *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. R. 497, citing *Baughman v. Gould*, 45 Mich. 481, 8 N. W. R. 73; *Converse v. Blumrich*, 14 id. 109; *Steinbach v. Hill*, 25 id. 78; *Webster v. Bailey*, 31 id. 36; *Starkweather v. Benjamin*, 32 id. 305; *Beebe v. Knapp*, 28 id. 53. And in a still later case, *Totten v. Burhans* (1892), 91 Mich. 499, the same judge said: “The rule of law is well settled in this State since the case of *Holcomb v. Noble*, *supra*, that it is immaterial whether a false representation is made innocently or fraudulently, if by its means the plaintiff is injured.”

The **Pennsylvania** rule differs in little except form from the English rule. Thus in *Hexter v. Bast* (1889), 125 Pa. St. 52, 17 Atl. R. 252, 11 Am. St. R. 874, it is said: “The general rule is, that to support an action of deceit, properly so called, it must appear that the fraudulent representation complained of was untrue; that the defendant knew, or ought to have known, at the time it was made, that it was untrue; that it was calculated to induce the plaintiff to act upon it, and that, believing it to be true, he was induced to act accordingly. *Cox v. Highley*, 100 Pa. St. 249. As a general rule, the statement must be both false and fraudulent; but if a person take upon himself to state as true that of which he is

propositions: *First*, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. *Secondly*, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.

wholly ignorant, he will, if it be false, incur the same legal responsibility as if he had made the statement with knowledge of its falsity; the fraud consists in representing that he knows that of which he is in fact *consciously* ignorant." And in *Griswold v. Gebbie* (1889), 126 Pa. St. 353, 17 Atl. R. 673, 12 Am. St. R. 878, it is still more clearly put as follows: "There can be no question at this date that in an action of deceit the *scienter* must not only be alleged, but proved, and the jury must be satisfied that the defendant made a statement knowing it to be false, or with such *conscious ignorance* of its truth as to be equivalent to a falsehood. This is the general rule, and it has been declared with notable emphasis in several recent cases in this State." Citing *Dilworth v. Bradner*, 85 Pa. St. 238; *Duff v. Williams*, 85 id. 490; *McCandless v. Young*, 96 id. 289, and *Hexter v. Bast*, *supra*. See also *Erie City Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. R. 508.

In *Illinois* honest belief in the truthfulness of the representation is a bar to the action of deceit. *Endsley v. Johns* (1887), 120 Ill. 469, 12 N. E. R. 247, 60 Am. R. 572; *Holdom v. Ayer* (1884), 110 Ill. 448. See also *Jones v. Foster*, 175 Ill. 459, 51 N. E. R. 862. And so in *New Hampshire*. *Griswold v. Sabin* (1871), 51 N. H. 167, 12 Am. R. 76.

In *Iowa* the representation must have been knowingly false. *Avery v. Chapman* (1883), 62 Iowa, 144, 17

N. W. R. 454; *Scroggin v. Wood* (1893), 87 Iowa, 497, 54 N. W. R. 437.

In *New York* knowledge of the falsity and an intent to deceive must be shown. *Wakeman v. Dalley* (1872), 51 N. Y. 27, 10 Am. R. 551. In *Kountze v. Kennedy* (1895), 147 N. Y. 124, 41 N. E. R. 414, 49 Am. St. R. 651, it is said: "It has been held that one who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action." In *Hadcock v. Osmer* (1897), 153 N. Y. 604, 47 N. E. R. 923, it is said: "An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception and consequent loss. But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he be-

Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. *Thirdly*, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.”¹

believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud.”

The **New Jersey** rule seems also to accord with the English. Thus in *Cowley v. Smyth* (1884), 46 N. J. L. 380, 50 Am. R. 432, after a full review of the authorities, it is said: “In such an action (deceit) a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentations to support the action.” See also *Cummings v. Cass*, 52 N. J. L. 77.

In **Mississippi** it is said that to maintain an action for deceit “the defendants must have made a false statement knowing it to be false.” *Sims v. Eiland*, 57 Miss. 83, id. 607.

In **Virginia** knowledge of the falsity must be shown. *Proctor v. Spratley*, 78 Va. 254.

¹*Derry v. Peek* was an action of deceit brought by Sir H. Peek against Mr. W. Derry, the chairman, and Messrs. J. C. Wakefield, M. M. Moore, J. Pethick and S. J. Wilde, four of the directors, of the Plymouth, Devonport and District Tramways Company, claiming damages for alleged

fraudulent misrepresentations made by the defendants, whereby the plaintiff was induced to take shares in the company. The directors had issued a prospectus in which they set forth, as one of the chief inducements, that they had the right to use either animal, steam or mechanical means of locomotion. They also sent out a circular letter in which they referred to “special privilege” enjoyed by the company of using steam power instead of horse power. As matter of fact, the company had the right to use steam power only upon obtaining certain consents, which required to be renewed every seven years. These consents had not then been obtained, and were subsequently refused. The directors claimed, and the court found, that they believed, when they issued the prospectus and the letter, that these consents had already been practically obtained and would not be refused—that it was a mere matter of requirements to be complied with on the part of the company, “and that, if those requirements were complied with, there was no practical danger that the consent would be refused.” The case was tried before Stirling, J.,

It is true that *Derry v. Peek* was an action for deceit, but the same principles apply where a rescission is sought at law, although, as has been seen in a preceding section,¹ equity may relieve where there was no actual fraud.

§ 877. Representation must have been made to be acted upon by injured party.—The representation must be made with the intention that it should be acted upon by the party

who dismissed the case both because the representations were not fraudulent in such a sense as to make the defendants liable for deceit, and because the plaintiff was not really misled by the representation. *Peek v. Derry* (1887), L. R. 37 Ch. Div. 541. Plaintiff appealed to the court of appeal, and the case was argued before Cotton, L. J., Sir J. Hannen and Lopes, L. J., who unanimously reversed the judgment below and gave judgment for the plaintiff. Each of the judges delivered an opinion, all concurring that to make a statement as true which one does not know and has no reasonable ground to believe to be true was such fraud as would sustain an action for deceit. *Peek v. Derry*, 37 Ch. Div. 563. From this decision defendants appealed to the House of Lords, which unanimously reversed the court of appeal and affirmed the judgment of Stirling, J. *Derry v. Peek* (1889), 14 App. Cas. 337. Lords Halsbury, Bramwell, Watson, Fitz Gerald and Herschell delivered opinions. Lord Herschell made an exhaustive review of the decisions, beginning with *Pasley v. Freeman* (1789), 3 T. R. 51, 2 Sm. L. Cas. 74, and including *Haycraft v. Creasy* (1901), 2 East, 92; *Foster v. Charles* (1830), 7 Bing. 105; *Corbett v. Brown* (1831), 8 Bing. 33; *Polhill v. Walter* (1832), 3 B. & Ad. 114; *Crawshay v. Thompson* (1842), 4 M. & Gr. 357; *Moens v.*

Heyworth (1842), 10 M. & W. at p. 157; *Taylor v. Ashton* (1843), 11 M. & W. 401; *Evans v. Collins* (1844), 5 Q. B. 804; *Evans v. Edmonds* (1853), 13 C. B. 777; *Western Bank of Scotland v. Addie* (1867), L. R. 1 H. L. Sc. 145, 162; *Reese Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; *Peek v. Gurney* (1873), L. R. 6 H. L. 377; *Weir v. Bell* (1878), 3 Ex. Div. 238; *Arkwright v. Newbold* (1881), 17 Ch. Div. 301; *Edgington v. Fitzmaurice*, (1885), 29 Ch. Div. 459; *Smith v. Chadwick* (1882), 20 Ch. Div. 27, 9 App. Cas. 187.

Derry v. Peek has been both vigorously assailed and defended. Sir Frederick Pollock writes a trenchant article in 5 L. Q. Rev. (1887), 410, in which he says: "The purpose of this paper is to show that the grounds assigned in *Derry v. Peek*, whether necessary for the decision or not, are erroneous in law, and ought to be disregarded by every tribunal which is at liberty to disregard them;" and as to these he subsequently says (6 L. Q. Rev. 72, n.) he "was thinking chiefly of American courts." Sir William R. Anson, on the other hand, comes to its support in 6 L. Q. Rev. 72. See also, per Lord Esher, in *Tomkinson v. Balkis Consolidated Co.*, [1891] 2 Q. B. 614. In this country the decision has been quite generally criticised. 23 Am. L. Rev. 1007, 24 id. 154, 155.

¹ § 863.

injured by it.¹ The rule is frequently stated that it must have been made with an intention to deceive the party injured, and this, of course, is true; but it is not essential that an intention to deceive should have been actively present to the deceiver's mind, nor that he should have foreseen and contemplated all of the results which would ensue.² The intention to deceive will be presumed from the fact that he has made a statement, which he did not know or believe to be true, with the intention that it should be acted upon, and this presumption cannot be overthrown by evidence that there was no intention to deceive.³ If, on the other hand, the representation was not made with the intention or expectation that it would be acted upon, or was not calculated to induce action, the mere fact that some one has acted upon it to his injury will not give rise to an action of deceit nor warrant rescission.⁴

§ 878. —. The representation must also have been made to induce action *by* the party injured,⁵ though it need not have

¹ Endsley v. Johns (1887), 120 Ill. 469, 12 N. E. R. 247, 60 Am. R. 572; Cowley v. Smyth (1884), 46 N. J. L. 380, 50 Am. R. 432; Tacoma v. Tacoma L. & W. Co., 16 Wash. 288, 47 Pac. R. 738.

² Thus in Judd v. Weber (1887), 55 Conn. 267, 11 Atl. R. 40, it is said: "It is a mistake to suppose that it is essential to a fraudulent intent that it should reach forward and actually contemplate the resulting damage to the other party. There is a fraudulent intent, if one, with a view of benefiting himself by intentional falsehood, misleads another in a course of action which may be injurious to him."

³ In Cowley v. Smyth (1884), 46 N. J. L. 380, 50 Am. R. 432, it is said: "The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the de-

fendant's knowledge. The *scienter* as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff." Fraudulent intent will be presumed from false representation intended to be acted upon. Haven v. Neal (1890), 43 Minn. 315, 45 N. W. R. 612. A denial of actual intent to defraud does not avoid the consequences of an act which is in effect a fraud. Newlove v. Callaghan (1891), 86 Mich. 301, 48 N. W. R. 1096.

⁴ See Smith v. Mariner (1856), 5 Wis. 551, 68 Am. Dec. 73.

⁵ Thus in Carter v. Harden (1886),

been made directly to him; if it be made to one person with the expectation and purpose that it shall be communicated to and acted upon by another, it is enough.¹ Neither is it necessary

78 Me. 528, 7 Atl. R. 392, it is held that a wife cannot maintain an action to recover damages for injuries received by her in using a vicious horse, against the person who sold the horse to her husband with representation that it was not vicious. Plaintiff contended that defendant sold the horse to her husband knowing that it was to be used as a family horse, but the court found that defendant did not know this, but supposed it was to be used by the husband in his business as a sewing machine peddler. The case was likened to *Winterbottom v. Wright*, 10 M. & W. 109, and distinguished from *Langridge v. Levy*. In *Langridge v. Levy* (1837), 2 M. & W. 519, it appeared that Levy sold a gun to the father, Langridge, for the use of himself and his sons, with certain representations as to its make and safety, which proved to be untrue, and Langridge, the son, in using the gun, was injured. Held, that the son might maintain an action against Levy to recover damages. It has been said, however, in later cases, that this was regarded as a case whose principle was not to be extended. And, in general, the rule is well settled that the false representation will give a cause of action to those persons only who had a right to rely upon it as one made with the intention that it should or might influence their action. *Wells v. Cook* (1865), 16 Ohio St. 67, 88 Am. Dec. 436; *McCracken v. West*, 17 Ohio, 16; *Rawlings v. Bean*, 80 Mo. 614; *Beesley v. Hamilton*, 50 Ill. 88; *Savings Bank v. Albee*, 63 N. H. 152, 56 Am. R. 501;

Munro v. Gairdner, 3 Brev. (S. C.) 31, 5 Am. Dec. 531.

The cause of action survives to the personal representatives of the person deceived. *Baker v. Crandall* (1883), 78 Mo. 584, 47 Am. R. 126.

(In cases of negligence for selling or furnishing dangerous articles, the right of a remote party to sue, if injured, has been sustained. *Schubert v. Clark*, 49 Minn. 331, 51 N. W. R. 1103, 32 Am. St. R. 559, 15 L. R. A. 818; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. R. 298; *Wellington v. Oil Co.*, 104 Mass. 64; *Elkins v. McKean*, 79 Pa. St. 493; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. R. 154, 52 Am. R. 715; *George v. Skivington*, L. R. 5 Ex. Cas. 1; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. R. 311. *Contra*, *Heizer v. Kingsland Mfg. Co.*, 110 Mo. 605, 19 S. W. R. 630, 33 Am. St. R. 482, 15 L. R. A. 821; *Necker v. Harvey*, 49 Mich. 517, 14 N. W. R. 503; *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. R. 244, 23 Am. St. R. 220, and cases cited in these cases.)

In *Peek v. Gurney*, L. R. 6 H. L. 377, it was held that liability for false representations in a prospectus to induce the subscription for shares did not extend to the vendees of the original subscribers. But in *Waterbury v. Andrews* (1887), 67 Mich. 281, false representations to a husband, repeated by him to his wife to induce her to become surety for him, were held to avail the wife to defeat liability.

¹ *Chubbuck v. Cleveland* (1887), 87 Minn. 466, 35 N. W. R. 362, 5 Am. St. R. 864 [citing *Langridge v. Levy*,

that the particular person who shall act upon it be at the time identified; if it be made to be acted upon by any one of a class of persons and one of that class does consequently act upon it, it is sufficient.¹

§ 879. Party complaining must have been deceived by the representation.—In the next place the party complaining must have relied upon the representation and been deceived thereby. For if he did not rely upon the representation, or if he knew it was false and therefore was not deceived by it, it has done him no injury.² And so, if he did not believe the

supra; *Iasigi v. Brown*, 17 How. (U. S.) 183]. Representation may be made to agent. *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. R. 560; *Riggs v. Thorpe*, 67 Minn. 217, 69 N. W. R. 891.

¹ This is well illustrated by the cases (more fully to be considered in a later section. § 894) of representations to commercial agencies, to be by them communicated to their patrons. *Eaton v. Avery*, 83 N. Y. 31, 38 Am. R. 339; *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. R. 959, 19 Am. St. R. 738; *Robinson v. Levi*, 81 Ala. 134, 1 S. R. 554; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. R. 771, 13 L. R. A. 270; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. R. 802, 13 Am. St. R. 425; *Fechheimer v. Baum*, 37 Fed. R. 167, 2 L. R. A. 153; *Genesee County Savings Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. R. 790, 18 N. W. R. 206.

Representations made to the public generally, by means of prospectuses and the like, issued by the directors or promoters of corporations, for the purpose of securing subscriptions, deposits, etc., also afford an excellent illustration of how a representation to a class, *i. e.*, the public, may become a representation to an individual, when one member of that

public adopts and acts upon it. See *Derry v. Peek*, 14 App. Cas. 337; *Peek v. Gurney*, L. R. 13 Eq. Cas. 79, L. R. 6 H. L. 377; *Seale v. Baker*, 70 Tex. 283, 7 S. W. R. 742, 8 Am. St. R. 592; *Bartholomew v. Bentley*, 15 Ohio, 659, 45 Am. Dec. 596; *Delano v. Case*, 121 Ill. 247, 12 N. E. R. 676, 2 Am. St. R. 81; *Morgan v. Skiddy*, 62 N. Y. 319; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. R. 284; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. R. 432; *Terwilliger v. Great West. Tel. Co.*, 59 Ill. 249; *Pad-dock v. Fletcher*, 42 Vt. 389.

² *Ming v. Woolfolk* (1885), 116 U. S. 599, 6 S. Ct. 489; *Proctor v. McCoid* (1882), 60 Iowa, 153, 14 N. W. R. 208; *Humphrey v. Merriam* (1884), 32 Minn. 197, 20 N. W. R. 138; *Priest v. White* (1886), 89 Mo. 609, 1 S. W. R. 361; *Bennett v. Gibbons* (1888), 55 Conn. 450, 12 Atl. R. 99; *Arnstine v. Treat* (1888), 71 Mich. 561, 39 N. W. R. 749; *Phipps v. Buckman*, 30 Pa. St. 401; *Hiller v. Ellis*, 72 Miss. 701, 18 S. R. 95; *Gregory v. Schoenell*, 55 Ind. 101; *Dady v. Condit*, 163 Ill. 511, 45 N. E. R. 224; *Hartford F. Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 29 S. R. 651; *Davidson v. Crosby*, 49 Neb. 60, 68 N. W. R. 338; *Fromer v. Stanley*, 95 Wis. 56, 69 N. W. R. 820.

If the party acted on his own judg-

representation,¹ or if its falsity was apparent from the things open to his observation,² or, according to many cases, if its falsity would have been discovered if he had exercised ordinary care and prudence, he cannot be deemed to have been deceived.

§ 880. — In order to give rise to a cause of action, the representations, it was said by the supreme court of the United States, must be representations relating to a matter as to which the complaining party did not possess at hand the means of knowledge. Where means of knowledge are at hand, and equally available to both parties, and the subject of the purchase is equally open to their inspection, if the purchaser does not avail himself of those means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was drawn into it by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another.³

ment or investigation he cannot complain. *Slaughter's Adm'r v. Gerson*, 13 Wall. (U. S.) 379; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 S. Ct. 881; *Farrar v. Churchill*, 135 U. S. 609, 10 S. Ct. 771; *Farnsworth v. Duffner*, 142 U. S. 43, 12 S. Ct. 164; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. R. 16, 16 Am. St. R. 137; *Halls v. Thompson*, 1 S. & M. (Miss.) 443; *Hagee v. Grossman*, 31 Ind. 223; *Nye v. Merriam*, 35 Vt. 438.

¹ *Bowman v. Carithers*, 40 Ind. 90; *Dady v. Condit*, 163 Ill. 511, 45 N. E. R. 224; *Hartford F. Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 S. R. 651; *Davidson v. Crosby*, 49 Neb. 60, 68 N. W. R. 338; *Fromer v. Stanley*, 95 Wis. 56, 69 N. W. R. 820.

² *Long v. Warren*, 68 N. Y. 426, and

cases cited in following note. Information of the falsity of the representation received at any time before the party has become bound is enough. *Whiting v. Hill*, 23 Mich. 399; *Pratt v. Philbrook*, 41 Me. 132.

³ *Slaughter's Adm'r v. Gerson*, 13 Wall. (U. S.) 379. To same effect: *Long v. Warren* (1877), 68 N. Y. 426; *Studer v. Bleistein*, 115 N. Y. 316, 23 N. E. R. 243; *Rubber Co. v. Adams*, 23 Pick. (Mass.) 256; *Mooney v. Miller*, 102 Mass. 217; *Brown v. Leach*, 107 Mass. 364; *Leavitt v. Fletcher*, 60 N. H. 182; *Hobbs v. Parker*, 31 Me. 143; *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624; *Saunders v. Hatterman*, 2 Ired. (N. C.) L. 32, 37 Am. Dec. 404; *Etheridge v. Vernoy*, 70 N. C. 713; *Finlayson v. Finlayson*,

§ 881. — **Right to rely on representation.**— This rule, however, is one not to be extended beyond the cases falling clearly within it, for where a person intentionally makes a false representation to influence the action of another, particularly where the representation is of such a kind as naturally to allay investigation, and thereby induces him to rely on the representation to his injury, the guilty person will not be permitted to escape liability by saying that the other was too easily deceived, or ought not to have trusted him.¹ And if, in any case, the means of knowledge were not present or were not equal, as if the matter was peculiarly within the knowledge of the

17 Oreg. 347, 21 Pac. R. 57, 3 L. R. A. 801; Moore v. Recek, 163 Ill. 17, 44 N. E. R. 868; Griffith v. Strand, 19 Wash. 686, 54 Pac. R. 613; Olcott v. Bolton, 50 Neb. 779, 70 N. W. R. 366; Dillman v. Nadleoffer, 119 Ill. 567.

¹ Thus, in *Albany City Sav. Institution v. Burdick* (1881), 87 N. Y. 40, the court, speaking of *Long v. Warren*, *supra*, said: "The authority of that case should not be extended to cases not clearly within the principles there laid down. It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded, when he demands relief, that he ought not to have believed or trusted him. Where one sues another for *negligence*, his own negligence contributing to the injury will constitute a defense to the action; but where one sues another for a positive, wilful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will not bar relief. If the rule were otherwise the unwary and confiding, who need the protection of the law the most, would be left a prey to the fraudulent and artful practices of evil-doers." In *Warder, etc. Co. v. Whitish* (1890), 77 Wis. 430, 46 N. W. R. 540, it is said: "A person

cannot procure a contract in his favor by fraud and then bar a defense to it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him." See also to same effect: *Jackson v. Collins*, 39 Mich. 557; *Gardner v. Trenary*, 65 Iowa, 646, 22 N. W. R. 912; *Olson v. Orton*, 28 Minn. 36, 8 N. W. R. 878; *David v. Park*, 103 Mass. 501; *Linington v. Strong*, 107 Ill. 295; *Thorne v. Prentiss*, 83 Ill. 99; *Cottrill v. Krum*, 100 Mo. 397, 18 Am. St. R. 549, 13 S. W. R. 753.

In *Chamberlin v. Fuller* (1886), 59 Vt. 247, it is said: "The defendant insists that the false representations must have been such as to deceive a man of ordinary care and prudence; *i. e.*, if a man is not endowed with those faculties he is at the mercy of every swindler who makes him his prey, excluding from the benefits of the law the very class around whom its arm should be thrown — thus protecting the strong and robbing the weak. As well adopt Rob Roy's rule: 'That they should take who have the power, and they should keep who can.' No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." See also *post*, § 1841.

party making the representation,¹ or if the thing concerning which it was made was not present or open to observation,² or if the party making the representation did anything to prevent or dissuade the other from investigating for himself,³ then the rule above referred to, denying him a remedy, does not apply.

§ 882. —. It is not necessary that the false representation shall have been the *sole* cause of the deceit; if it was a contributing cause, it is enough.⁴

§ 883. —. Whether the alleged representation was such an one as the plaintiff had a right to rely upon, or whether it was of a character to deceive such a person as he, are questions for the jury.⁵

§ 884. **Misrepresentation must have caused proximate injury.**— And, lastly, the party relying upon the representation must have sustained injury. “Fraud without damage, or damage without fraud, gives no cause of action,” said Croke, J., in an old case,⁶ “but where these two do concur then an action lieth.” The amount of the injury is not material (except as affecting the amount of the damages to be awarded in an action), so long as it be of the kind and nature of which the law takes cognizance.

§ 885. —. And here, as elsewhere, the injury complained of must have been the natural and proximate result of the misrepresentation. “A misrepresentation goes for nothing,” it is

¹ Smith v. Richards, 13 Pet. (U. S.) 26. Mass. 20; Mathews v. Bliss, 22 Pick. 48.

² Martin v. Jordan, 60 Me. 531.

³ Harris v. McMurray, 23 Ind. 9; Webster v. Bailey, 31 Mich. 36; Roseman v. Canovan, 43 Cal. 110. ⁵ Ingalls v. Miller (1889), 121 Ind. 188, 22 N. E. R. 995.

⁴ Cook v. Gill, 83 Md. 177, 34 Atl. R. 248; Handy v. Waldron, 19 R. I. 618, 35 Atl. R. 884; Roberts v. French (1891), 153 Mass. 60, 26 N. E. R. 416, 10 L. R. A. 656; Windram v. French (1890), 151 Mass. 547, 24 N. E. R. 914, 8 L. R. A. 750; Safford v. Grout, 120 R. I. 99, 37 Atl. R. 532. ⁶ Baily v. Merrell (1616), 3 Bulst. 94. To same effect: Childs v. Merrill, 63 Vt. 463, 22 Atl. R. 626, 14 L. R. A. 261; Ming v. Woolfolk, 116 U. S. 599, 6 S. Ct. 489; Jordan v. Pickett, 78 Ala. 331; Holton v. Noble, 83 Cal. 7, 23 Pac. R. 58; Danforth v. Cushing, 77 Me. 182; Butterfield v. Barber, 20

said, "unless it is a proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place."¹ As has been noticed, however, it is not necessary that the representation was the sole inducement, if it was a material and contributing one.

II.

OF FRAUD UPON THE SELLER.

§ 886. **Forms of fraud.**—The forms of fraud are infinite, and it is impossible to describe them all. It will suffice for the present purpose to mention a few of the phases which most frequently present themselves when the seller is to be deceived.

§ 887. **Fraudulent personation.**—A kind of fraud not infrequently practiced upon the seller is that of fraudulent personation, as, for example, where A, for the purpose of defrauding B, leads B by false representations to believe that A is C, or is the agent of C, and thereby induces B to deliver goods to A under the mistaken belief that he is selling them to C.² The

¹ *Adams v. Schiffer* (1887), 11 Colo. 15, 17 Pac. R. 21, 7 Am. St. R. 202, quoting *Kerr on Fraud*, 84. To same effect: *Dawe v. Morris*, 149 Mass. 188, 14 Am. St. R. 404, 4 L. R. A. 158, 21 N. E. R. 313.

² S., who falsely and fraudulently pretended to represent B. & Co., called upon D. and contracted with him for wool to be consigned to B. & Co. S. also called upon B. & Co. and pretended to be the son of D., and contracted to sell them wool. The wool was shipped by rail consigned to B. & Co., but S. procured it from the railroad company and delivered it to B. & Co., who paid S. for it. *Held*, that D.'s title was not divested

and that he could recover the wool or its value from B. & Co. *Barker v. Dinsmore* (1872), 72 Pa. St. 427, 13 Am. R. 697. "The principle which underlies this case, and by which the rights of the parties are to be determined," said the court, per Williams, J., "is this: The sale of goods by one who has tortiously obtained their possession without the owner's consent vests in the purchaser no title to them as against the owner. As a general rule no man can be divested of his property without his own consent and voluntary act. It is true that there are exceptions to the rule, as clearly defined and as well settled as the rule itself, but this case

distinction between this case and those to be hereafter considered of sales induced by false representations as to solvency and the like is obvious. There the seller intends to sell to the person who obtains the goods, though his consent to such sale

does not come within any of them. Here the defendants' vendor acquired no right or title to the wool under his contract with the plaintiff [the jury having found that D. had not sold the wool to S. but to B. & Co., and upon their credit], and he [S.] did not obtain from him [D.] its actual possession. The railroad company had no authority, as the plaintiff's agent, to deliver the wool to him, and their delivery gave him no right or title to it whatever. Nor had he any apparent or implied authority from the plaintiff to sell or dispose of it. It is clear then that he could convey no title by its sale; and if so the defendants could acquire no title by its purchase, though they purchased it for a fair and valuable consideration, in the usual course of trade, without notice of the plaintiff's ownership, or of any suspicious circumstances calculated to awaken inquiry or put them on their guard. The case is a hard one in any aspect of it. One of two innocent parties must suffer by the fraud and knavery of a swindler, who had no authority to act for either. But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it. The case was tried on this principle, and as there is no error apparent in the record the judgment must be affirmed." See also *McGoldrick v. Willits* (1873), 52 N. Y. 612.

Where one, falsely and fraudulently pretending to be the agent of a third person, as such pretended agent purchases personal property from a vendor who intends to vest the title in the supposed principal, the sale is void and vests no title in such pretended agent, and he cannot, by a subsequent sale, confer title upon another. The seller is not estopped from reclaiming by the fact that he permitted the bill of lading to be made out in the name of the pretended agent. The measure of the seller's recovery is the value of the property at the time of the refusal to restore it, less the value of improvements added in good faith by the purchaser from the pretended agent. *Peters Box & Lumber Co. v. Lesh* (1888), 119 Ind. 98, 12 Am. St. R. 367, 20 N. E. R. 291.

The plaintiff, refusing to sell to C, a broker, delivered goods to him on his representation that they were for an undisclosed principal in good credit, entering and billing them as a sale to C. It appearing that there was no such principal, *held*, that plaintiff might replevy the goods from defendant, who was C's *bona fide* pledgee. *Rodliff v. Dallinger* (1886), 141 Mass. 1, 4 N. E. R. 805, 55 Am. R. 439. Said the court, per Holmes, J.: "The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important as such when a sale or contract is com-

may have been procured by fraud. Here the seller does not intend to sell to the person who obtains the goods but to another, who, as he is fraudulently led to believe, is the person obtaining the goods or his principal. *There* there is a *consent*,

plete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as when a vendee expressly or impliedly represents that he is solvent and intends to pay for the goods, when in fact he is insolvent and has no reasonable expectation of paying for them; or being identified by the senses *and dealt with as the person so identified*, says that he is A, when in fact he is B. But when one of the formal constituents of a legal transaction is wanting, there is no question of rescission; the transaction is void *ab initio*, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake. The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementson gave him no power to convey a good title to a *bona fide* purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting *bona fide* dealers with persons in possession, in cases like the present, were much urged in *Thacher v. Moors*, 134 Mass. 156, but did not prevail. Much less can they be allowed to prevail against a legal title without the intervention of statute." The entry on the books was held not conclusive (*Com. v. Jeffries*, 7 Allen, 548, 561, 83 Am. Dec. 712);

and as plaintiff did not sell to Clementson and there was no principal, there was no sale (*Edmunds v. Merchants' Desp. Trans. Co.*, 135 Mass. 283).

A swindler of the name of Kent, pretending to be a partner in the firm of Charles K. Kent & Son, a responsible firm of K., bought goods from Yates & Co., in Cleveland. Yates shipped the goods directed to Charles H. Kent & Son, supposing them to be the purchasers. When the goods reached K., the swindler, by other false representations, obtained them from the carrier and sold them to Dean, who claimed to be a *bona fide* purchaser; but it was held that even if he was, he was liable to Yates & Co. *Dean v. Yates* (1872), 22 Ohio St. 388. See also *Sanders v. Keber*, 28 Ohio St. 630.

R. falsely pretended to be the agent of L. and bought goods of H. ostensibly for L., and H. delivered them to L. L. had bought the same goods from R., supposing him to be the owner. R. paid H. part of the price. *Held*, that H. could recover the value of the property from L., less the amount received from R. *Hamet v. Letcher* (1881), 37 Ohio St. 356, 41 Am. R. 519.

A, falsely representing himself to be the member of a firm, bought goods from B in the name of the firm, to whom B. sent them by carrier. The firm declined to receive them and A thereupon sold them to C, to whom the carrier delivered them at A's request. *Held*, that B.

procured by fraud, and therefore a sale, though voidable. *Here* there is *no* consent, by reason of the fraud, and therefore no sale or a sale void.

could maintain trover against C, though the latter was a purchaser in good faith. *Moody v. Blake* (1875), 117 Mass. 23, 19 Am. R. 394. See also *Howe v. Combs* (Ky.), 38 S. W. R. 1052.

A sold goods to B, believing him to be the agent of C. Subsequently C took a mortgage on the goods in B's possession, refusing to recognize the agency. *Held*, that there was no sale and that A could maintain replevin against C. *Kemper Dry Goods Co. v. Kidder Saving Bank*, 72 Mo. App. 226.

Where goods of A are sold as the goods of B, the other party on discovering the fact may refuse to take them. *Barker v. Keown*, 67 Ill. App. 433.

Where a discharged clerk of a former customer fraudulently procured goods from plaintiff as being for the customer, and then sent them to the defendant, an auctioneer, for sale, it was held that plaintiff could maintain trover against the auctioneer. *Higgins v. Burton*, 26 L. J. Ex. 342.

Plaintiff, dealing with one Edward Gandell, who represented himself to be a member of the firm of Gandell & Co., sold goods which he supposed he was selling to that firm. Edward Gandell was but a clerk for Gandell & Co., though he was a partner in another firm, Gandell & Todd, and Edward Gandell sent the goods on their arrival to Gandell & Todd. The latter firm pledged them to defendant, who acted in good faith. *Held*, that plaintiff might maintain trover against defendant, as the property

had never passed out of plaintiff. *Hardman v. Booth*, 1 H. & C. 803.

A swindler of the name of A. Blenkarn took a room at 37 Wood street, near which, at 123 Wood street, W. Blenkiron & Son, a responsible firm, carried on business. He ordered goods of plaintiffs, who knew of Blenkiron & Son, but not the number of their store. His letters were dated at 37 Wood street and signed Blenkarn & Co., but so written as to resemble Blenkiron & Co. Plaintiffs, supposing they were dealing with Blenkiron & Son, sent the goods addressed to Messrs. Blenkiron & Co., 37 Wood street, where they were received by Blenkarn, who sold them to defendants. Defendants bought in good faith for value and resold the goods in ordinary course of their business. *Held*, that plaintiffs could recover their value from defendants. *Lindsay v. Cundy*, 3 App. Cas. 459, 2 Q. B. Div. 96, 1 id. 348.

Similar cases, in which the action was brought against the carrier for delivering to the wrong person, are numerous. *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Brod. & B. 177; *Heugh v. Railway Co.*, L. R. 5 Exch. 51; *Bush v. Railroad Co.*, 3 Mo. App. 62; *Wilson v. Express Co.*, 27 Mo. App. 360; *Price v. Railroad Co.*, 50 N. Y. 213, 10 Am. R. 475; *Guillaume v. Transportation Co.*, 100 N. Y. 491, 3 N. E. R. 489; *Winslow v. Railroad Co.*, 42 Vt. 700, 1 Am. R. 365; *American Express Co. v. Fletcher*, 25 Ind. 492; *American Express Co. v. Stack*, 29 Ind. 27, and many others collected in Hutchinson

§ 888. — **No title passes.**—No title passes out of the owner, and the person who so fraudulently obtains the goods can therefore convey none to any person, however innocent, and the owner may recover his goods not only from the wrongdoer himself, but even from a *bona fide* purchaser for value and without notice. There is no occasion for rescission of the sale, for there is no sale to rescind; the whole transaction is void *ab initio*.

It is simply another phase of a subject already considered — that of “Mistake”¹ — the mistake here being induced by the fraud of one of the parties to the transaction.

§ 889. **Possession fraudulently obtained.**—Questions may also arise where the parties have a sale in contemplation or process of negotiation, and the intended buyer, by fraudulent practices, obtains possession of the goods before the negotiations are completed or before the time has arrived at which, by the terms of the agreement, the title is to pass.² No title could be acquired by such a transaction, nor, in the absence of anything to work an estoppel against the owner, could even a *bona fide* purchaser acquire title from the person so obtaining possession.

§ 890. **Fraudulently disposing of goods conditionally delivered.**—As has been seen, goods may be delivered upon an executory contract of sale coupled with the condition that the title shall not pass until some precedent condition, such as payment, has been performed; and the condition is, by the weight of authority, effective against even a *bona fide* purchaser from the conditional vendee,³ unless the vendor has so clothed the

on Carriers (Mechem’s ed.), §§ 345-356. Compare with Samuel v. Cheney, 135 Mass. 278, 46 Am. R. 467; Edmunds v. Transportation Co., 135 Mass. 283, and cases there cited.

Where, however, there is no fraud or misrepresentation, the fact that A, who has really sold goods to B,

supposed that B was buying for C, will not give A a right of action in trover against C, who buys the goods from B. Stoddard v. Ham (1880), 129 Mass. 383, 37 Am. R. 369.

¹ See *ante*, §§ 265, 840.

² See *ante*, § 554.

³ See *ante*, § 599.

vendee with the evidences of title as to estop him from asserting title in himself.¹

§ 891. — But, as distinguished from this conditional contract of sale, there may be a present and absolute sale accompanied with a conditional delivery, and in such case a *bona fide* purchaser from the vendee may acquire a good title even though the condition upon which the delivery depended has not been complied with. Thus in New York it is said that the cases there “establish that a condition that the title shall not pass until payment, when attached to a delivery upon an actual completed contract of sale, is available only as against the vendee and persons claiming under him, other than *bona fide* purchasers without notice.”²

§ 892. **Misrepresentations by buyer as to his solvency or ability to pay.**— One of the most common forms of practicing fraud upon the seller is that of procuring goods from him, upon credit, in reliance upon false representations made by the buyer as to his solvency, means or ability to pay.³ There can be no question, of course, that, in sales upon credit, a representation as to the buyer's solvency, means or ability to pay is a *material* one,⁴ and, if false, it must operate as a fraud upon the seller

¹ Dows v. Kidder (1881), 84 N. Y. 121; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Smith v. Lynes, 5 N. Y. 41; Paddon v. Taylor, 44 N. Y. 371; Comer v. Cunningham, 77 N. Y. 391, 33 Am. R. 626.

² In Comer v. Cunningham, 77 N. Y. 391, 33 Am. R. 626, citing Smith v. Lynes, 5 N. Y. 41, and Rawls v. Deshler, 3 Keyes (N. Y.), 572. The court also said: “But after actual delivery, although as between the parties to the sale such delivery be conditional, a *bona fide* purchaser from the vendee obtains a perfect title (Smith v. Lynes, *supra*; Fleeman v. McKean, 25 Barb. (N. Y.) 474; Beavers v. Lane, 6 Duer (N. Y.), 238), though a volun-

tary assignee of the purchaser does not. Haggerty v. Palmer, 6 Johns. Ch. (N. Y.) 438.”

³ Cary v. Hotailing (1841), 1 Hill (N. Y.), 311, 37 Am. Dec. 323; Olmsted v. Hotailing, 1 Hill, 317; Hughes v. Winship Machine Co., 78 Ga. 793, 4 S. E. R. 6; Richmond v. Mississippi Mills, 52 Ark. 30, 11 S. W. R. 960, 4 L. R. A. 413; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259.

“Insolvency does not mean inability to pay ‘current demands as they mature,’ but it means not having money, goods or estate sufficient to pay all debts.” Noble v. Worthy, (Ind. Ter.), 45 S. W. R. 137.

⁴ McAleer v. Horsey, 35 Md. 439,

who relies upon it to his injury, and will justify him in avoiding the sale.¹ Neither can there be any question, in the ordinary case, that these are matters so peculiarly and necessarily within the buyer's own knowledge that he cannot well be innocently ignorant of them;² and that consequently a false representation, unqualifiedly made as of his own knowledge, must be deemed to have been knowingly and wilfully made;³ though there may, perhaps, be cases where such misrepresentation would be innocent.⁴

§ 893. —. The representation must, here as elsewhere, be a representation of fact and not a mere promise⁵ or expression of opinion.⁶ Here as elsewhere, also, the statement made may be

452; Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 19 Am. St. R. 738, 13 S. W. R. 959.

¹ See the cases cited under the several notes to this section. See also Dinkler v. Potts, 90 Ga. 103, 15 S. E. R. 690; Boyd v. Shiffer, 156 Pa. St. 100, 27 Atl. R. 60; Work v. Jacobs, 35 Neb. 772, 53 N. W. R. 993; Wolf v. Lachman (Tex. Civ. App.), 20 S. W. R. 867; Wright v. Wright, 51 N. J. Eq. 475, 637, 26 Atl. R. 166; Morrow Shoe Mfg. Co. v. New England Shoe Co., 60 Fed. R. 341, 57 Fed. R. 685, 6 C. C. A. 508, 8 C. C. A. 652, 24 L. R. A. 417, 425; England v. Forbes, 7 Houst. (Del.) 301; Hudson v. Bauer Grocery Co., 105 Ala. 200, 16 S. R. 693; Oswego Starch Co. v. Lendrum, 57 Iowa, 573; Starr v. Stevenson, 91 Iowa, 681, 60 N. W. R. 217; Reid v. Cowduroy, 79 Iowa, 169, 44 N. W. R. 351, 18 Am. St. R. 359; Smith K. & F. Co. v. Smith, 166 Pa. St. 563, 31 Atl. R. 343; Wingate v. Buhler, 62 Mo. App. 418; Des Farges v. Pugh, 93 N. C. 31; Wertheimer-Swartz Shoe Co. v. Faris (Tenn.), 46 S. W. R. 336.

² An active partner, who makes a representation concerning the finan-

cial standing of his firm, ought not to be heard to say that he did not know what his firm owned and owed. It is his duty to know. Morrison v. Adoue (1890), 76 Tex. 255, 13 S. W. R. 166.

³ That such representations are deemed to be of matters concerning which the party is bound to know. see Miner v. Medbury, 6 Wis. 295; Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. R. 507; Beetle v. Anderson, 98 Wis. 5, 73 N. W. R. 560.

⁴ In Jaffray v. Moss (1889), 41 La. Ann. 548, 6 S. R. 520, it is said that a statement as to solvency must be wilfully false and not be merely an opinion as to it.

⁵ See People v. Healy, 128 Ill. 9, 15 Am. St. R. 90, 20 N. E. R. 692; Haenu v. Bleisch, 146 Ill. 262, 34 N. E. R. 153.

⁶ Representations as to value are usually matters of opinion. Ellis v. Andrews, 56 N. Y. 83, 15 Am. R. 379; Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. R. 779, 36 Am. St. R. 701; Lynch v. Murphy, 171 Mass. 307, 50 N. E. R. 623; Evans v. Gerry, 174 Ill. 595, 51 N. E. R. 615.

So of statements respecting the

rendered false by the active concealment of a part of the truth as well as by the expression of that which is untrue; and a party who undertakes to make a statement respecting his solvency or ability to pay is bound to make a fair one or suffer the consequences of a fraudulent misrepresentation.¹

§ 894. — Representations to agents — “Commercial agencies.” — It is not essential that the misrepresentation should have been made to the seller in person: it may be made to his agent, or to a third person with the intent and for the purpose of being communicated to the seller.²

The most common means of such communication, in modern times, is the so-called “commercial agency” whose business it is to collect information concerning the pecuniary standing of dealers and to furnish this information to its patrons. In obtaining such information, the “agency” may make independent investigation, or it may procure and report the statement of the dealer himself concerning his condition. It not infre-

value or sufficiency of a security. *Deming v. Darling*, 148 Mass. 504, 2 L. R. A. 743, 20 N. E. R. 107.

So of statements that the party is doing “a nice business,” that “everything was looking promising,” etc. *Wakefield Rattan Co. v. Tappan*, 70 Hun (N. Y.), 405.

So is a statement that “I can safely promise you that our dealings, if you wish to continue them, will be more satisfactory than last season.” *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. R. 637.

¹ Thus where a person who desired credit was asked “how he stood,” and correctly stated his means but said nothing about the fact that he owed two-thirds as much as he had, it was held fraudulent. *Newell v. Randall* (1884), 32 Minn. 171, 19 N. W. R. 972, 50 Am. R. 562. See also *Jandt v. Potthast*, 102 Iowa, 223, 71 N. W. R. 216. So where the party stated that there

were no mortgages on his stock, when he was then under a binding agreement to give one which he did not disclose, and stated that his stock was insured, but did not disclose that the insurance had been pledged, it was held fraudulent. *Fechheimer v. Baum* (1889), 37 Fed. R. 167, 2 L. R. A. 153. So where the buyer exhibited an invoice of the goods, but concealed a contemporaneous contract which provided that the buyer did not acquire title until a sum, equal to the value of the goods, was paid, it was held fraudulent. *Nairn v. Ewalt*, 51 Kan. 355, 32 Pac. R. 1110.

But the mere fact that the buyer did not mention certain debts is not necessarily fraudulent, where they did not affect his solvency. *Noble v. Worthy* (Ind. Ter.), 45 S. W. R. 137.

² *Richmond v. Mississippi Mills*, 52 Ark. 30, 11 S. W. R. 960, 4 L. R. A. 413; *Moyer v. Lederer*, 50 Ill. App. 94.

quently resorts to both methods, and it will be obvious that important distinctions may result so far as the responsibility of the dealer for the statements of the agency is involved.

§ 895. The methods and purposes of these "agencies" are now so well known that courts take judicial notice of them, and it is entirely settled that a representation made by a dealer to such an agency or its representative, to be furnished by it to its patrons, is to be deemed to be a representation to any of such patrons to whom it is furnished and who may have occasion to act upon it.¹

¹In *Genesee Savings Bank v. Michigan Barge Co.* (1883), 52 Mich. 164, 169, 17 N. W. R. 790, 18 N. W. R. 206, it is said: "The business of these agencies is well known to the commercial community. Indeed it is said by Justice Rapallo in *Eaton v. Avery*, 83 N. Y. 31, 38 Am. R. 389, that 'the business and office of these agencies are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency, when applied to by a customer to sell goods to him on credit, may, by resorting to the agency or the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining

it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and, in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.' In these views of the learned judge we entirely concur. They are supported by *Commonwealth v. Call*, 21 Pick. (Mass.) 515, 32 Am. Dec. 284, and *Commonwealth v. Harley*, 7 Metc. (Mass.) 462. We think a person furnishing information to a commercial agency as to his means and pecuniary responsibility is to be presumed to have done so to enable the agency to communicate the same to persons interested for their guidance in giving credit to him, and so long as such intention exists, and the representations reach the persons for whom they were intended, it is immaterial whether they passed through a direct

Statements made to the "agency" or its representative by an agent of the dealer, authorized to make it, stand, of course, upon the same footing as though made by the dealer in person.¹

§ 896. — **How long to be relied upon — Duty to notify if changed.**— The effect of representations is usually to be determined by their truth or falsity at the time they are made, and they cannot ordinarily be deemed to be guaranties of the continuance of existing conditions. It is doubtless true, also, that a dealer who has given, upon request, a statement of his financial condition, true when made, is not ordinarily bound to subsequently follow it up with voluntary statements of changes in his condition.² But there may well be cases in which a

channel or otherwise, provided they were reported by the agency as made by the party."

To same effect: *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. R. 771, 13 L. R. A. 270; *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. R. 959, 19 Am. St. R. 738; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. R. 802, 13 Am. St. R. 425; *Fechheimer v. Baum*, 37 Fed. R. 167, 2 L. R. A. 153; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. R. 790; *Hiller v. Ellis*, 72 Miss. 701, 18 S. R. 95; *Moyer v. Lederer*, 50 Ill. App. 94; *Aultman & Co. v. Carr*, 16 Tex. Civ. App. 430, 42 S. W. R. 614; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. R. 316; *Lindauer v. Hay*, 61 Iowa, 663, 17 N. W. R. 98; *Robinson v. Levi*, 81 Ala. 135, 1 S. R. 554; *Belleville Pump Works v. Samuelson*, 16 Utah, 234, 52 Pac. R. 282; *Newman v. Claffin* (1899), 107 Ga. 89, 32 S. E. R. 943.

¹ See *Nevada Bank v. Portland Nat. Bank*, 59 Fed. R. 338.

In *Wakefield Rattan Co. v. Tappan*, 70 Hun, 405, it is held that representations made by the bookkeeper of the buyer could not be considered

unless he was shown to be authorized to make them.

In *Schram v. Strouse* (Tex. Civ. App.), 28 S. W. R. 262, the buyer's son and bookkeeper were given general control of the business. They made untrue statements to a commercial agency. The buyer claimed immunity because he did not know that such statements had been made. "But it remains," said the court, "that the statements were legally his acts, and, as plaintiffs were misled by them, he ought not to be heard to say that he was ignorant of them." *Morrison v. Adoue*, 76 Tex. 261, 13 S. W. R. 166. He was bound to know what his agents had done in the exercise of authority given to them by himself."

² In *Burchinell v. Hirsh* (1895), 5 Colo. App. 500, 39 Pac. R. 352, it was held that as a general rule a buyer is under no obligation whatever to furnish unsought information either as to his present or his changed financial condition; and although, after he had made statements to commercial agencies, he found his financial

dealer will make statements and permit their continued publication, when no longer true, with the express purpose of defrauding; and cases in which a dealer, who knows that a previous statement is still being used as a statement of existing conditions, may be deemed guilty of fraudulent representation if he does not correct them after his condition has materially changed.¹

condition altered so that in some substantial respect his statement would not be true, he is not bound to publish his insolvency. The court criticised the trial court because, in its charge to the jury, it "left the level of common every-day life and entered a moral region with which few men are familiar." [The present writer, however, ventures to entertain the hope and the belief, founded upon a somewhat wide observation of judicial tendencies, that, in matters of fraud, not all of the practices "of common every-day life" will receive the sanction of the courts.] See also cases cited in the following note.

¹ In *Mooney v. Davis* (1889), 75 Mich. 188, 42 N. W. R. 802, 13 Am. St. R. 425, it is held that, where a merchant had recently made statements to a commercial agency, and there had since been material changes in his condition, he was bound to notify the agency of the change. *Morse, J.*, dissented, and it seems to be a decision not to be extended beyond its facts.

Knowingly to permit a false rating to be carried on the books of a commercial agency is fraud. *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. R. 283; *Lindauer v. Hay*, 61 Iowa, 663, 17 N. W. R. 98; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. R. 316; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. R. 112.

In *Cortland Mfg. Co. v. Platt* (1890), 83 Mich. 419, 430, 47 N. W. R. 330, it is said: "This court has not gone so far in any case as to hold that traders must report to the commercial agencies every variation in their circumstances. It is only when they are in an insolvent condition, and are or should be aware that they will be obliged to suspend or fail in their business, that they owe it as a duty to creditors, or those they solicit to deal with them upon credit, to inform them of their situation, or to notify the commercial agencies of their change of situation. Purchases not made in good faith, while in such straits, may well be regarded as fraudulent. But no fraud can be predicated upon the fact that a merchant or trader makes a representation of his standing which is truthful at the time to a commercial agency and thereby obtains credit. If a considerable time elapses, and no new statements are made, and no new representations as to his standing, it cannot be said that, if his condition has changed, he is guilty of actual fraud, unless he knows, or the circumstances are such that he should know, that the credit is extended upon the strength of the original rating of the commercial agency. Fraud is a question of fact to be deduced from all the circumstances, and a vendor cannot shut his eyes to the subsequent reports of the com-

§ 897. — Statements made by agency on its own information — Material alterations of dealer's statement.— The same considerations may apply where an "agency" makes a statement of a dealer's condition without inquiry of him and in reliance solely upon outside information, or materially alters one made by him. A dealer ignorant of a misrepresentation so made could, of course, not be responsible for it,¹ though it might be brought to his attention in such a way as to reason-

mercial agencies tending to cast doubt and suspicion upon the financial ability and credit of a merchant or trader, and rely upon a statement by such person made a year before." See also *Strickland v. Willis* (Tex. Civ. App.), 43 S. W. R. 602.

In *Sharpless v. Gummey*, 166 Pa. St. 199, 30 Atl. R. 1127, it is said that the seller has no right to rely upon statements made to a commercial agency two years and a half before the sale. So, in substance, it was held of statements true when made, but made fifteen to eighteen months before the sale. *Reid v. Kempe*, 74 Minn. 474, 77 N. W. R. 413.

In *Lowdon v. Fisk* (Tex. Civ. App.), 27 S. W. R. 180, it was held that the fact that the statements were made to the commercial agency a year before the sale did not of itself defeat the seller's right to rely upon them. "It is well understood," said the court, "that such statements are made as a basis for a continuing credit, and it is not necessary that they should be made exactly at the time of the sale. Such a requirement would be unreasonable. The length of time that has elapsed since the making of the statement, within reasonable limits, is for the consideration of the court and jury in passing upon the question as to the extent that the sale was actu-

ally influenced thereby." To same effect: *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. R. 316.

Whether the seller was justified in relying upon a statement made two months before, without inquiry as to present conditions, is for the jury. *Richardson Dry Goods Co. v. Goodkind*, 22 Mont. 462, 56 Pac. R. 1079.

In a criminal case (*Treadwell v. State*, 99 Ga. 779, 27 S. E. R. 785), sixty days was held to be too long a time, unless vendee reaffirms it or knows, or has reason to believe, that vendor is relying upon it.

¹ Where the statement as made by the buyer to a commercial agency is materially altered by the "agency" and published only in its altered form, the buyer cannot be charged with fraud in reliance upon it. *Wachsmuth v. Martini*, 154 Ill. 515, 39 N. E. R. 129. To same effect: *Ralph v. Fonder-Smith*, 3 Pa. Super. Ct. 618, 40 W. N. C. 116; *Poska v. Stearns*, 56 Neb. 541, 76 N. W. R. 1078, 42 L. R. A. 427, 71 Am. St. R. 688.

But where the "agency" corrected an error in the sum of the vendee's liabilities as stated by him, this was held not such an alteration as released the vendee from liability for the statement. *Belleville Pump Works v. Samuelson*, 16 Utah, 234, 52 Pac. R. 282.

ably cast upon him the duty to guard against its continued use if it were materially untrue.

§ 898. — **Representation must have been relied upon.**— Here, as elsewhere, if the statement of the “agency,” though untrue, was not relied on, it cannot be made the basis of an action or a rescission.¹

§ 899. **Other false representations inducing sale.**— The seller may likewise be deceived by other false representations of the buyer. Thus, though representations concerning the worth or value of an article are usually matters of opinion and not of fact, representations concerning the cost or what one paid for an article are often, at least, deemed representations of matters of fact, and may give rise to an action or justify rescission.² So where the buyer, in order to induce a sale, falsely asserts that he has just bought like goods from the seller’s neighbor for a certain price, he makes a misrepresentation of fact which will justify repudiation by the seller.³

¹ Though buyer has made a false representation to one commercial agency, if the seller relied upon the report of another agency he cannot rescind. *Hiller v. Ellis*, 72 Miss. 701, 18 S. R. 95.

Where the false statement to the “agency” is not communicated to the vendor until after the sale is completed, he cannot rescind because of it. *Manhattan Brass Co. v. Reger*, 168 Pa. St. 644, 32 Atl. R. 64. So, where the “agency,” in transmitting the statement of the buyer, warned the seller that the buyer’s estimates as to his means were too high. *Cohn v. Broadhead*, 51 Neb. 834, 71 N. W. R. 747.

Where the report as made by the “agency” is made up partly of its own conclusions and partly of the buyer’s statements, and the seller re-

lies upon it *as a whole*, he cannot rescind because a fact stated by the buyer was untrue. *Poska v. Stearns*, 56 Neb. 541, 76 N. W. R. 1078, 42 L. R. A. 427; *Berkson v. Heldman*, 58 Neb. 595, 79 N. W. R. 162.

The mere fact that the seller subsequently received other information raises no presumption that he did not rely on the “agency” report. *Richardson Dry Goods Co. v. Goodkind*, 22 Mont. 462, 56 Pac. R. 1079.

² See *post*, § 937, where this question is more fully discussed.

³ *Smith v. Countryman* (1864), 30 N. Y. 655. So where the buyer falsely represents that he can buy like goods of the seller’s competitor at a certain price. *Smith, K. & F. Co. v. Smith*, 166 Pa. St. 563, 31 Atl. R. 343. See also *Edelman v. Latshaw*, 180 Pa. St. 419, 36 Atl. R. 926.

§ 900. —. But a statement by the buyer, during the negotiations, that he would give no more than a sum named, when he had in fact concluded to pay more if necessary, has been held not to be a fraud upon the seller.¹ And so it has been held that a statement made by the buyer that the persons with whom he was associated would not permit him to pay more than a given sum, when in fact they had imposed no such limitation, does not constitute such a fraud upon the seller as will entitle him to maintain an action.² So, ordinarily, a false statement as to the buyer's motive in making the purchase will not constitute fraud.³

§ 901. **Buying goods intending not to pay for them.**—A person who buys goods upon credit thereby impliedly if not expressly represents that he intends to pay for them.⁴ If therefore he has then no such intention, and, *a fortiori*, if he has then a present intention not to pay for them, and conceals this fact from the seller, there is such a misrepresentation of a material fact as will entitle the seller either to avoid the sale⁵ or to main-

¹ *Humphrey v. Haskell* (1863), 7 Allen (Mass.). 497. So of statements by the seller that no more favorable terms "would be given" to any other buyer. *Huber v. Guggenheim* (1898), 89 Fed. R. 598.

² *Vernon v. Keys* (1810), 12 East, 632; affirmed, 4 Taunt. 488; s. c., 11 Revised Reports, 499. As to this case, Sir Frederick Pollock, in the preface to the eleventh volume of the Revised Reports, after referring to it as a case of "doubtful authority," says: "It seems to be supportable only on the ground of failure to prove damage. A's opinions or intentions are as much a matter of fact to B as the law of Scotland is a matter of fact in an English court. And if B makes a wilfully false statement about A's opinion or intention, it may make him liable for deceit as well as any other kind of false statement."

³ *Byrd v. Rautman*, 85 Md. 414, 36 Atl. R. 1099.

⁴ Buying goods upon a promise to pay cash, not intending to pay at all but to credit amount on a claim against the seller, is a fraud which entitles the seller to rescind. *Blake v. Blackley*, 109 N. C. 257, 13 S. E. R. 786, 26 Am. St. R. 566.

⁵ *Donaldson v. Farwell*, 93 U. S. 631; *Belding v. Frankland*, 8 Lea (Tenn.), 67, 41 Am. R. 630; *Wertheimer-Swartz Shoe Co. v. Faris* (Tenn.), 46 S. W. R. 336; *Burrill v. Stevens*, 73 Me. 395, 40 Am. R. 366; *Kearney Milling Co. v. Union Pacific Ry. Co.* (1896), 97 Iowa, 719, 66 N. W. R. 1059, 59 Am. St. R. 434; *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. R. 217; *Reid v. Cowduroy*, 79 Iowa, 169, 44 N. W. R. 351, 18 Am. St. R. 359; *Oswego Starch Co. v. Lendrum*, 57 Iowa, 573, 10 N. W. R. 900, 42 Am. R. 53; *Lindauer v. Hay*, 61 Iowa, 663,

tain an action for the deceit.¹ The existence of such an intention is not a mere promise or a matter of opinion,² but a present fact peculiarly within the knowledge of the buyer; and the concealment of an intention contrary to that indicated by his conduct in buying may well be termed, as it has been, a fraudulent concealment.³

§ 902. —. The intention not to pay must be one existing at the time of the sale, or, as it is often described, a preconceived intention, and not merely one formed after the sale.⁴ It must

17 N. W. R. 98; *Lee v. Simmons*, 65 Wis. 523, 27 N. W. R. 174; *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. R. 959, 19 Am. St. R. 738; *Deitz v. Sutcliffe*, 80 Ky. 650; *Kline v. Baker*, 106 Mass. 61; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. R. 1117; *Morrison v. Adoue*, 76 Tex. 255, 13 S. W. R. 166; *Stewart v. Emerson*, 52 N. H. 301; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. R. 637; *Dow v. Sanborn*, 3 Allen (Mass.), 181; *Ayres v. French*, 41 Conn. 142; *Morrill v. Blackman*, 42 Conn. 324; *Reaiger v. Kendall* (Ky.), 39 S. W. R. 257; *Merrill Chem. Co. v. Nickells*, 66 Mo. App. 678; *Reid v. Lloyd*, 67 Mo. App. 513; *Staver Mfg. Co. v. Coe*, 49 Ill. App. 426; *Hudson v. Bauer Grocery Co.*, 105 Ala. 200, 16 S. R. 693; *Shipman v. Seymour*, 40 Mich. 274; *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. R. 373; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. R. 112; *Sprague v. Kempe*, 74 Minn. 465, 77 N. W. R. 412; *Consolidated Milling Co. v. Fogo* (1899), 104 Wis. 92, 80 N. W. R. 103; *Lee v. Simmons*, 65 Wis. 523, 27 N. W. R. 174; *Adler v. Thorp*, 102 Wis. 70, 78 N. W. R. 184.

¹ So held in *Swift v. Rounds* (1896), 19 R. L. 527, 35 Atl. R. 45, 33 L. R. A. 561, 43 Cent. L. J. 266, 61 Am. St. R. 791.

² See *ante*, § 871.

³ See cases *supra*.

⁴ "Nor is it enough that after the purchase the vendee conceives a design and forms a purpose not to pay for the goods, and successfully avoids paying for them. The only intent that renders the sale fraudulent is a positive and predetermined intention, entertained and acted upon at the time of going through the forms of an apparent sale, never to pay for the goods." *Burrill v. Stevens* (1882), 73 Me. 395, 40 Am. R. 366 [citing *Cross v. Peters*, 1 Greenl. 378; *Biggs v. Barry*, 2 Curtis, 259; *Parker v. Byrnes*, 1 Low. 539; *Rowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607]; *King v. Brown*, 24 Ill. App. 579; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. R. 637; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. R. 547.

Where, however, goods previously ordered but not then received are subsequently received and kept at a time when the buyer knows, or ought to know, that he cannot pay for them or must fail in his business, it was held that an intent not to pay for them may be inferred, even though, when he ordered them, he thought he could pay for them. *Whitten v. Fitzwater*, 129 N. Y. 626, 29 N. E. R.

also be an intention not to pay at all or never to pay, and not merely an intention not to pay according to the contract or not to pay when due.¹

§ 903. — Intention not to pay coupled with insolvency.

The intention not to pay is usually found coupled with a concealed condition of insolvency, and there can be no question that if a buyer, who is insolvent and who intends not to pay, conceals from the seller his condition and intention for the purpose of securing the goods, there is such a fraud upon the seller as will entitle him to disaffirm the sale.² The condition of insolvency, though usual and made a prerequisite to disaffirmance in some States,³ does not seem, upon principle, to be necessary.⁴ It is, however, frequently of importance as bearing upon the question of intention. Direct proof of an inten-

298; *Pike v. Wieting*, 49 Barb. (N. Y.) 314. But the contrary is declared in *Brooks v. Paper Co.*, 94 Tenn. 701, 31 S. W. R. 160. And in all cases evidence of what was done afterward is admissible for the purpose of throwing light upon the intention at the time of the purchase. *Ross v. Miner*, 67 Mich. 410, 35 N. W. R. 60.

¹ "To constitute the fraud there must be a preconceived design never to pay for the goods. A mere intent not to pay for the goods when the debt becomes due is not enough; that falls short of the idea. A design not to pay according to the contract is not equivalent to an intention never to pay for the goods, and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud." *Burrill v. Stevens*, 73 Me. 395, 40 Am. R. 366. To same effect: *Bidault v. Wales*, 20 Mo. 546, 64 Am. Dec. 205; *Beebe v. Hatfield*, 67 Mo. App. 609; *Strickland v. Willes* (Tex. Civ. App.), 43 S. W. R. 602.

² See cases cited in notes to section 901.

³ Thus, in Alabama, three things must be shown to entitle the seller to rescind: 1. That the purchaser was at the time of the sale insolvent or in failing circumstances. 2. That he had at the time a preconceived intention not to pay for the goods, or, what is deemed equivalent, no reasonable expectation of being able to pay for them. 3. There must have been on the part of the purchaser either a fraudulent concealment of, or a fraudulent representation in reference to, one or more of these facts. *Le Grand v. Eufaula National Bank*, 81 Ala. 123, 60 Am. R. 140, 1 S. R. 460. See also *Kyle v. Ward*, 81 Ala. 120; *Robinson v. Levi*, 81 Ala. 134; *Wollner v. Lehman*, 85 Ala. 274. But see now, *Maxwell v. Brown Shoe Co.*, 114 Ala. 304, 21 S. R. 1009.

⁴ See cases cited in notes to section 901.

tion not to pay is usually impossible to make. It may therefore, as is said in one case,¹ "be deduced from the facts and circumstances without any actual representations, full knowledge by the purchaser of his insolvency being always a controlling element."

§ 904. — Cause for rescission, distinct from false representations.— Buying goods with the intention not to pay for them is a ground of avoidance entirely distinct from that of false representations, and may exist when no such representations were made.² In Pennsylvania, however, the rule is otherwise, and it is not enough unless there was also some "actual artifice intended and fitted to deceive."³ And the same rule has, with some modification, been declared in Alabama.⁴

§ 905. — Intention, how determined.— The existence of the intent is a question of fact for the jury,⁵ and here, as in other cases of fraudulent intent, a wide range of inquiry is allowed, to put before the jury all the facts and circumstances

¹ *Belding v. Frankland*, 8 Lea (Tenn.), 67, 41 Am. R. 630.

² Thus in *Ross v. Miner*, 67 Mich. 410, 35 N. W. R. 60, it is said: "If they [the purchasers] bought the goods intending never to pay for them, and intending to get rid of such payment by the interposition of [a] mortgage between the plaintiffs' and defendant's assets, then it would be a fraud upon plaintiffs having an equal effect in law as regards this suit as if they had made false and fraudulent representations as to their financial standing at the time they bought the goods." And in *Bugg v. Wertheimer-Schwartz Shoe Co.*, 64 Ark. 12, 40 S. W. R. 134, 45 Cent. L. Jour. 97, there is a full discussion to the effect that the two causes for rescission are distinct and separate, and one may exist without the other. So also in *Johnson Co. v. Triplett*,

66 Ark. 233, 50 S. W. R. 455; *Hart v. Moulton* (1899), 104 Wis. 349, 80 N. W. R. 599.

³ *Smith v. Smith*, 21 Pa. St. 367; *Backentoss v. Speicher*, 31 Pa. St. 324; *Rodman v. Thalheimer*, 75 Pa. St. 232.

⁴ See cases cited in second note to section 903; *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123, 1 S. R. 460, 60 Am. R. 140; *Kyle v. Ward*, 81 Ala. 120, 1 S. R. 468; *Robinson v. Levi*, 81 Ala. 135, 1 S. R. 554; *Wollner v. Lehman*, 85 Ala. 274, 4 S. R. 643. But see now, *Maxwell v. Brown Shoe Co.*, 114 Ala. 304, 21 S. R. 1009.

⁵ *Gavin v. Armistead*, 57 Ark. 574, 22 S. W. R. 431; *Byrd v. Hall*, 2 Keyes (N. Y.), 646; *Ross v. Miner*, 67 Mich. 410, 35 N. W. R. 60; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. R. 1117; *Boyd v. Shiffer*, 156 Pa. St. 100, 27 Atl. R. 60.

which may throw light upon it.¹ Thus, for example, evidence of similar representations made to others, or of similar purchases made of others at about the same time, is admissible for the purpose of showing the intention with which the representations or purchases in question were made.² And so it is competent to prove that the vendee, who knew himself to be insolvent, purchased goods, at about the same time, of many other persons, in largely excessive quantities, and out of the season for their sale, as throwing light upon the question of his intention not to pay for them.³

¹ *Ross v. Miner*, 67 Mich. 410, 35 N. W. R. 60; *Taylor v. Mississippi Mills*, 47 Ark. 247, 1 S. W. R. 283; *Brower v. Goodyer*, 88 Ind. 572; *Huthmacher v. Lowman*, 66 Ill. App. 448; *Edelhoff v. Horner Mfg. Co.*, 86 Md. 595, 39 Atl. R. 314.

² *Raby v. Frank*, 12 Tex. Civ. App. 125, 34 S. W. R. 777; *Fait & Slagle Co. v. Truxton*, 1 Pennew. (Del.) 24, 39 Atl. R. 457; *Freeman v. Topkis*, 1 Marv. (Del.) 174, 40 Atl. R. 948; *Huthmacher v. Lowman*, 66 Ill. App. 448; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. R. 316. In the last case (*Cox Shoe Co. v. Adams*) the court said: "If the issues presented involve the intention or good faith of the defendants, then, as bearing thereon, evidence is admissible of like transactions at or about the time, or that the act complained of is a part of a series of similar occurrences. If Adams had purchased but one small bill of goods through misrepresentation or concealment, it might well be argued that there was no intent to defraud because of the small profit. But when it appears that this is only one of a series of different purchases, made under similar circumstances, and a part of a scheme to accumulate goods valued at thousands of dol-

lars, on credit, then his fraudulent purpose is apparent. *Bigelow, Fraud*, 160; *State v. Brady*, 100 Iowa, 191; *Rowley v. Bigelow*, 12 Pick. 306; *Insurance Co. v. Armstrong*, 117 U. S. 591; *Schofield v. Shiffer*, 156 Pa. St. 65."

³ *Cox Shoe Co. v. Adams, supra*.

In the following cases the facts were held not to amount to such fraud upon the seller as to warrant rescission:

Levi v. Bray (1895), 12 Ind. App. 9, 39 N. E. R. 754. *Hattie L. Wolf* and *Max B. Kaufman* were engaged in business under the firm name of *Wolf & Kaufman*. *Lee Wolf*, husband of *H. L. W.*, as her representative, assisted in the management of the business of the firm. Appellees, prior to June 23, 1893, had sold goods to the firm of *W. & K.*, which goods were on that date still unpaid for. Appellees on that day pressed for payment, whereupon *L. W.* represented to appellees that the firm of *W. & K.* was solvent and had accounts outstanding sufficient to pay all their indebtedness, which statements were accepted as true by appellees, and they thereupon importuned *L. W.* to buy more goods from them, but he replied that they did

§ 906. — Concealment of insolvency or inability to pay not enough.—The fact that the purchaser is at the time insolvent, or in such a financial condition that he can have no

not want to buy. On July 8, 1893, one of appellees' traveling salesmen called and took from W. & K. an order for goods amounting to \$471.85, being for the goods mentioned in the complaint, which order was duly filled, and the goods upon being received were at once mingled with the stock of W. & K., then worth about \$19,000. On October 5, 1893, W. & K. mortgaged their stock of goods to Levi to secure payment of \$19,000, of which sum \$12,000 was owing directly to Levi, and for the other \$7,000 he was surety. All of this indebtedness except \$787 was in existence on June 23, 1893. On October 9, 1893, the appellees instituted this action, having previously demanded of W. & K. "a rescission of the sale and return of the goods." The goods were seized on that day by the sheriff, and were of the value of \$330. On October 10, 1893, "Levi by a written bill of sale purchased said stock and took possession of the same," in satisfaction of the mortgage thereon held by him. At the time of taking his mortgage Levi had no knowledge that the appellees had or claimed any interest in the goods. The debts owing by W. & K. to L. were *bona fide*. L. was the father of H. L. Wolf. W. & K. were in fact insolvent on June 23, 1893, yet they continued doing business and buying goods. Appellees believed the statements made by L. W. concerning the solvency of W. & K. to be true, and on the faith thereof sold the goods. It was held that the goods were not acquired by W. & K. from appellees by fraud, and that

L. had the better title to the goods. Said the court, speaking by Mr. Chief Justice Ross: "The representations relied on by the appellees as the basis of their right to recover were made not for the purpose of inducing appellees to sell the goods in controversy, but were made to mollify appellees' apprehensions, so that they would not urge the payment of the balance then due them from Wolf & Kaufman. To constitute fraud sufficient to set aside a sale of goods the purchase must have been perfected through some artifice, trick, false pretense, misstatement of the facts, or suppression of the truth, which enables the purchaser to obtain possession of the goods without consideration."

Fromer v. Stanley (1897), 95 Wis. 56, 69 N.W. R. 820. F. is a manufacturer and wholesale dealer in cigars in New York city. S. is a retail dealer in cigars in Milwaukee. A. is F.'s salesman. S. had been accustomed to buy cigars from A., both before and after A. became salesman for F. S. had bought of F. through A. twenty-five thousand cigars, under agreement of F. that he would aid S. in selling fifteen thousand of them to the retail trade, and A. had gone with S. for that purpose. On their way home, in October, 1894, after selling the cigars, A. and S., being acquaintances of eight or nine years' standing, had fallen to discussing S.'s affairs. It was testified by A. that in the course of the conversation the following was said by A. to S.: "Why you must be worth from \$20,000 to \$50,000," and that S. "poo-hooed at

reasonable expectation of being able to pay for the goods, and that he conceals this condition from the seller, is not alone enough to entitle the seller to rescind.¹ There must be also an

the idea of \$50,000, but on our way told me in words plainly that he considered himself worth \$10,000 to \$20,000 clear anyhow." A. believed this statement to be true when he subsequently sold goods to S., and declared that in the absence of such representations and S.'s statement that he would discount the bills in January next, upon which he relied, he would not have sold S. the cigars now in controversy, which were sold some time between October and January. Later, March 25, 1895, S. made an assignment, and on March 27th, F., having just learned of S.'s insolvency, attempted to rescind the sale for fraud. Upon this point said Mr. Chief Justice Cassoday in rendering the opinion of the court: "After completing the business of the day at Racine, and while riding home on the cars, an accidental remark of Alces induced Stapleton to say that he 'considered himself worth from ten to twenty thousand dollars clear.' It is not stated as an existing fact, but merely that he 'considered' himself worth that amount,—in other words, that that was his estimate or opinion of his then present worth; and the fact that he

said from \$10,000 to \$20,000 shows that he was not claiming to have any definite knowledge nor well-defined opinion on the subject; and besides, he was talking to a man who, from the nature of things, would naturally be supposed to know more or less about his financial condition. There is nothing to indicate that the statement was dishonestly made, nor made with intent to deceive or defraud any one. . . . We must hold that the representations of Stapleton, assuming them to have been made as testified to by Alces, and that they were false, were not of such a character as authorized the plaintiff to rely upon them, and avoid the sale in consequence of them."

Hallacher v. Henlein (1896), — Tenn. Ch. App. —, 39 S. W. R. 869. On January 1, 1894, defendant's inventory showed assets \$9,973.87, and liabilities \$14,172.24; excess of liabilities \$4,196.48. Of his debts, \$3,403 were owing to an uncle and an aunt, and he had as much time as he pleased in which to pay this debt. Another debt of \$7,200 was due in weekly instalments of \$400 each, but the creditor had agreed that if he could not pay these instalments as

¹Talcott v. Henderson (1877), 31 Ohio St. 162, 27 Am. R. 501, seems to go further and to declare "that an insolvent purchaser, without reasonable expectations of ability to pay, should be presumed to intend not to pay;" but it is doubtful if the learned judge who wrote the opinion intended to do more than to lay down a rule of evidence. The case is ap-

proved in Wilmot v. Lyon, 49 Ohio St. 296. Some other cases also seem to support this rule. See Morrow Shoe Mfg. Co. v. New England Shoe Co., 57 Fed. R. 685, 6 C. C. A. 508, 24 L. R. A. 417; Davis v. Stewart, 8 Fed. R. 803. The great weight of authority certainly is the other way, as will be seen in the following note.

intention not to pay;¹ though the fact that the buyer was insolvent, or in such a financial condition that he could have no

they fell due the notes might be renewed. His business was apparently prosperous, and during the months of January, February, March and April his purchases amounted to \$16,000 and his sales to nearly \$13,000. The monthly purchases increased from less than \$1,500 in January to more than \$7,000 in April. The monthly sales increased from January to March and fell off in April. There was nothing suspicious in his sales. His goods were not forced

upon the market. He made no representation to the plaintiffs concerning his solvency when he made the purchases under consideration, and plaintiffs asked nothing concerning it. During the four months of January-April, he withdrew from his business for his own use about \$3,500. He made a general assignment on May 8th, and at no time from January 1st to May 8th had he a reasonable expectation of being able to pay all his debts. Plaintiffs upon learn-

1 "This is not a question of reasonable expectation, but of fraudulent purpose. It is not a question whether the grounds of their belief that they could and should pay were sound and rational, but whether they did so believe in point of fact." *Curtis, J., in Biggs v. Barry*, 2 Curt. 259. "The sanguine, hopeful mind, rashly confident or inconsiderate, disbelieves in failure, and for that very reason sometimes plucks success out of desperate circumstances. The law lets the insolvent keep his own counsels, and struggle with his embarrassments, so long as he has an honest hope of overcoming them." *Durfee, C. J., in Dalton v. Thurston*, 15 R. I. 418, 7 Atl. R. 112, 2 Am. St. R. 905. To like effect: *Watson v. Silsby*, 166 Mass. 57, 43 N. E. R. 1117; *Reticker v. Katzenstein*, 26 Ill. App. 33; *Houghtaling v. Hills*, 59 Iowa, 287, 13 N. W. R. 305; *Kelsey v. Harrison*, 29 Kan. 143; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Reid v. Cowduroy*, 79 Iowa. 169, 44 N. W. R. 351, 18 Am. St. R. 359; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. R. 16, 1 L. R. A. 201; *Manheimer v. Harrington*, 20 Mo. App.

297; *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. R. 373; *Bell v. Ellis*, 33 Cal. 620; *Nichols v. Pinner*, 18 N. Y. 295; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Wright v. Brown*, 67 N. Y. 1; *Wheeler & Wilson Mfg. Co. v. Keeler*, 65 Hun (N. Y.), 508; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. R. 1050; *Garbutt v. Bank*, 22 Wis. 384; *Redington v. Roberts*, 25 Vt. 686; *Ex parte Whittaker*, L. R. 10 Ch. App. 446; *Mears v. Waples*, 3 Houst. (Del.) 581; *Birchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. R. 352; *Franklin Sugar Ref. Co. v. Collier*, 89 Iowa, 69, 56 N. W. R. 279; *Dorman v. Weakley*, — Tenn. —, 39 S. W. R. 890; *Consolidated Milling Co. v. Fogo*, 104 Wis. 92, 80 N. W. R. 103; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. R. 599.

The vendee is not bound voluntarily to advertise his own insolvency. *Birchinall v. Hirsch*, *supra*; *Hacker v. Munroe*, 56 Ill. App. 532; *Gavin v. Armistead*, 57 Ark. 574, 22 S. W. R. 431; *Hallacher v. Henlein*, — Tenn. —, 39 S. W. R. 869; *Reeder Bros. Shoe Co. v. Prylinski*, 102 Mich. 468, 60 N. W. R. 969; *Diggs v. Denny*, 86 Md. 116, 37 Atl. R. 1037.

reasonable expectation of being able to pay, may be taken into consideration in determining whether an intention not to pay

ing of his insolvency promptly demanded a return of the goods. The court held that, in the absence of fraudulent misrepresentations, the sale could be avoided only by showing a preconceived intention not to pay for the goods, and that the lack of reasonable expectation of being able to pay was insufficient. It held that here was no fraud sufficient to authorize rescission of the sale.

Commercial National Bank v. Pirie (1897), 49 U. S. App. 596, 15 Bkg. L. Jour. 45, 82 Fed. R. 799, 27 C. C. A. 171. In 1891 and at other times below mentioned, W. was president of the Cherryvale National Bank, and was also doing a mercantile business in Cherryvale, Kansas. On February 17 or 18, 1892, W. applied to the firm of C., P., S. & Co., at their place of business in Chicago, Ill., to purchase a bill of goods, and on being asked by a member of the firm to make a property statement as a basis for obtaining credit, he produced and exhibited the following document which had been executed by M., cashier, at the request of W.:

"R. T. WEBB, President.

"A. H. HARDING, Vice-Prest.

"T. C. MOLLOY, Cashier.

"C. F. GODBEY, Asst. Cashier.

"CHERRYVALE NATIONAL BANK.

"Capital, \$50,000.00.

"CHERRYVALE, KANSAS,

"Feby. 15, 1892.

"Carson, Pirie, Scott & Co., Chicago, Ill.—Gentlemen: We will guaranty the payment of any bill of goods which Mr. R. T. Webb may buy of you while in Chicago, during the present week. If this guaranty

is not specific enough we will make it satisfactory to you.

"Yours, very truly,

"THE CHERRYVALE NATIONAL BANK,

"Per T. C. MOLLOY, Cashier."

Upon the strength of this W. was allowed to purchase of C., P., S. & Co. goods to the extent of \$6,395.25. W. made no other representation concerning his solvency, nor was he asked to do so. Bills for the goods were to mature on May 15th and June 15th. At the time of the purchase W. was unable to meet his obligations as they matured and the Ch. Bank was insolvent, though it was continuing to do business. On June 10th the doors of the Ch. Bank were closed by direction of the controller of the treasury. On the same day W. executed two chattel mortgages covering his entire stock in trade in favor of the appellants herein, the Com. Bank and one Guernsey. A part of the consideration for these mortgages was a loan of \$700 that day made by G. The remainder was prior indebtedness. G., acting for himself and for the Com. Bank, of which he was cashier, immediately took possession of the property and advertised it for sale, and it was accordingly sold. P., prior to the sale, notified the Com. Bank that the sale to W. had been induced by certain fraudulent representations made by him concerning his solvency, and that they rescinded the said sale, and they demanded the return of the goods. They brought suit, after the mortgage sale, for conversion, and the trial court peremptorily instructed the jury to return a ver-

existed.¹ *A fortiori* is it not enough to defeat the sale that the seller supposed the vendee to be solvent when in fact he was not, nor that both vendor and vendee were mistaken as to the latter's solvency.²

dict for the plaintiffs, from the judgment upon which the defendants now appeal. The appellate court holds that the guaranty of the Ch. Bank, being *ultra vires*, was void, and that the firm of P. were bound to know this and could not claim to be defrauded by it. Whether or not W. bought with the preconceived intention not to pay for the goods was a question of fact for the jury, since the evidence that he did was not so clear and convincing but that two reasonable men could possibly differ upon it.

Consolidated Milling Co. v. Fogo (1899), 104 Wis. 92, 80 N. W. R. 103. F. on March 28, 1898, knew himself to be insolvent, yet he ordered of C. a carload of flour which was duly shipped to and received by him, and, on April 5th and 6th thereafter, was stored in his store. F. made no representations as to his solvency, and C. asked no questions concerning it. At the time of the purchase F. intended to pay for the flour. On the afternoon of April 6th, after all the flour had been taken into possession by F. and removed to his store, H., a creditor firm, through their agent J., pressed F. for payment, which was refused. J. thereupon threatened to bring suit. Later in the day B., another creditor, through its cashier,

came to F. and requested that it be further secured. F. after some hesitation gave B. a chattel mortgage upon his stock, which mortgage was immediately recorded. In the evening of the same day, April 6th, H. commenced suit against F. and attached his property. On April 9th C. brought replevin for the flour in question on the ground that the sale was procured through fraud, and that it might and did rescind the same. On March 23d, in another city, and without the knowledge of F., P. had, in response to an inquiry by A., agent of C., declared that F.'s financial standing was all right. P. was not aware that F. intended to order any flour of C., but had reason to believe that what he said would probably influence C. in any action it might take in regard to F. B., of which P. was at that time cashier, was a heavy creditor of F. C. was induced to fill F.'s order of March 28th in reliance upon P.'s statement to C.'s agent A., and without such statement it would not have filled F.'s order. Said the court, speaking by Cassoday, C. J.: "An honest, though abortive, purpose to continue business, and pay for the goods, is consistent with the vendee's knowledge of his own insolvency. We must hold that the sale of the flour

¹ Dalton v. Thurston, 15 R. I. 418, 7 Atl. R. 112, 2 Am. St. R. 905; Edson v. Hudson, 83 Mich. 450, 47 N. W. R. 347; Rodman v. Thalheimer, 75 Pa. St. 232; Bughman v. Central Bank, 159 Pa. St. 94; Cincinnati Cooperage

Co. v. Gaul, 170 Pa. St. 545, 32 Atl. R. 1093; Reager v. Kendall (Ky.), 39 S. W. R. 257.

² Lupin v. Marie, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256.

§ 907. Remedies of the seller.—The seller of goods who has been induced to part with them by reason of fraudulent practices on the part of the buyer, such as have been described, has usually his choice of three actions: 1. He may ignore the fraud and recover the price agreed upon; 2. He may, in a

to Fogo was complete and without any fraud before the giving of either of the mortgages. . . . Pease was not Fogo's representative and had no authority to speak for him. It was a mere casual conversation. . . . The defendant bank had no business with Anderson at the time. Pease was not transacting any business for the bank at the time of making the declarations attributed to him. . . . It is obvious that he could not bind the bank by such declarations."

West v. Graff (1899), 23 Ind. App. 410, 55 N. E. R. 506. G. & S. were insolvent on and subsequent to January 15, 1898. On that date they ordered of Graff the goods described in the complaint. They knew they were insolvent and made no representations whatever, nor were any questions asked them. Upon receipt of the goods they were placed in G. & S.'s store and put in course of sale at retail. Later, on January 31st, G. & S. mortgaged their entire stock to W. in trust to sell and pay certain creditors in full, and the remainder, including Graff, *pro rata* out of the balance. W. immediately took possession and by February 28th had completed the sale. On February 10th, G., having heard of the assignment, demanded of W. that the goods described in the complaint should be returned and delivered up, on the ground that they had been procured through fraud. Upon being refused, the appellees brought replevin, March 2d, and recovered in the lower court.

The court of appeals reversed the decision and remanded the cause, saying upon the question of fraud: "It does not appear that they [G. & S.] made any representation whatever to the appellees, or that any inquiry was addressed to them or others by the appellees before they sold and delivered the goods upon the mere order for such goods. . . . The mere fact of the making of the mortgage soon afterwards, together with the fact of insolvency, could not be taken to indicate that such disposition of the goods to favored creditors was purposed at the time of sale and delivery of the goods, or that the buyers purchased them with the design not to pay for them."

In the following cases the facts are held to amount to such fraud on the part of the buyer as warrants the seller in rescinding the sale and reclaiming the goods:

Carstairs v. Kelley Co. (1895), — Ky. App. —, 29 S. W. R. 622. T. sold twenty barrels of whisky to K., who were wholesale dealers. K. "was insolvent at the time of purchase, and, instead of handling the whisky in its usual way as a distributor to the retail trade, it immediately placed the warehouse receipts therefor in the hands of brokers to be sold for cash. When detected it refused to make restitution to the vendors on terms manifestly just." *Held*, that these "are circumstances which abundantly support the conclusion reached by the lower courts that the sale was

proper case, bring an action for the deceit; or, 3. He may rescind the sale and recover his goods or their value. The last of these, which is the most common and usually the most efficacious, is the only one which requires consideration in this place. The form of action is ordinarily replevin for the goods

procured with the fraudulent intent on the part of the buyers not to pay for the goods."

Reager v. Kendall (1897), — Ky. App. —, 39 S. W. R. 257. On July 7th K. purchased lumber of R. K. was insolvent at the time and knew it, but R. did not find it out until July 13th, when the present action was brought to rescind the sale and reclaim the lumber. The lumber was delivered on July 9th and 10th, and on the 11th a large part of it was found at the house of K.'s wife and was being used in the construction of a building on her lot. On July 12th K. made a voluntary assignment for the benefit of creditors. The court held that in the purchase of this lumber he [K.] acted fraudulently, and with the intention to deprive plaintiff of his property, saying: "We think that the appellant in this case had a right to a rescission of the contract, and for a restitution of the lumber sold and found in the possession of the vendee or his assignee, and for a personal judgment for the value of the goods which had been disposed of."

Aultman v. Carr (1897), 16 Tex. Civ. App. 430, 42 S. W. R. 614. On March 15, 1895, M. was insolvent, yet he informed the Louisiana agency of Dun & Co. that his assets were about \$27,000, and his liabilities about \$11,000, and Dun's rated him accordingly. On September 18th he ordered of A., through their traveling salesman, a carload of buggies. A., upon receipt of the order, exam-

ined M.'s rating in Dun's and Bradstreet's, and finding M. rated in both at between ten and twenty thousand, with excellent credit, accepted the order and proceeded to ship the buggies, which reached M. on the morning of October 12th. About October 1st M.'s creditors began to press him, and on October 9th or 10th he had a deed of trust made out in blank. On the evening of October 12th, after unloading the buggies and putting them in his storehouse, M. executed and delivered the deed of trust, including in the conveyance the buggies just received, and made his uncle, C., the trustee. C. took without knowledge of the representation to Dun & Co., but without paying any consideration. On October 16th, upon learning of this assignment, A. elected to rescind the contract of sale, and demanded of C. the return of the goods, and, upon being refused, commenced these proceedings in sequestration. The court held that "the sale of the goods could not have been completed until their delivery to the carrier. At that time Morris was not only insolvent, but his creditors were pressing him, and he knew it. At the time the goods were received . . . he had for several days had the deed of trust prepared, leaving a blank for the name of the trustee, and on the very day of their arrival the name of the trustee was inserted and the deed delivered. At the time the claimed purchase of the goods was completed

themselves or trover for their value, though the seller may repossess himself of the goods by his own act, it has been held, if he can do so without unnecessary violence or a breach of the peace.¹

§ 908. Election of remedy — Reasonable time. — A sale induced by the fraudulent practices of the buyer is not absolutely void, but voidable merely,² and therefore presents to the seller the alternative of affirmance or disaffirmance. And he must do one thing or the other; and he cannot, in respect of the same goods, do both.³ He has, however, neither occasion nor reason for election until the fraud is discovered by him, and what he does before that time, therefore, cannot be deemed

the purchaser could not have reasonably expected to pay for them." Judgment was therefore given in favor of A. against M. and C. and the sureties for the full value of the goods, they having been disposed of.

Whitaker v. Brown (1899), — Tex. Civ. App. —, 49 S. W. R. 1104. W. had been in the habit of buying lumber of B. in carload lots, paying cash for it. About October 1, 1897, he ordered the carload in question, and it was shipped on October 4th, at his request, to H. At that time, within the space of fifteen days, W. continued sending in orders until eight or ten carloads of lumber were ordered from B., nothing being said about paying cash or buying on credit. On October 18th W. made a deed of trust for the benefit of certain other creditors, conveying \$9,575 worth of claims, including the claim against H. for the lumber in question. A few days before this, W. wrote B. asking if they would accept his sixty-day paper for the lumber. They replied in the affirmative, but did not hear from him again. Said the court: "The conduct of

Whitaker on this occasion, and the circumstances, indicate in a reasonable manner that he intended to get from plaintiffs [appellees] the goods without paying for them, and this being a substantial fraud [is] sufficient in law to annul the sale."

¹*Hodgeden v. Hubbard* (1846), 18 Vt. 504, 46 Am. Dec. 167, criticised in *Dustin v. Cowdry*, 23 Vt. 646.

²*Clough v. London & N.W. Ry. Co.*, L. R. 7 Ex. 26; *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57; *Cochran v. Stewart*, 21 Minn. 435; *Old Dominion St. Co. v. Burckhardt*, 31 Gratt. (Va.) 664; *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. R. 208; *Union Stockyards Co. v. Mallory*, 157 Ill. 554, 41 N. E. R. 888, 43 id. 979, 48 Am. St. R. 341.

³*Lloyd v. Brewster*, 4 Paige (N. Y.), 537, 27 Am. Dec. 88; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Bulkley v. Morgan*, 46 Conn. 393; *Dibblee v. Sheldon*, 10 Blatch. 178; *First Nat. Bank v. Tootle*, 44 Neb. 59, 80 N. W. R. 264; *Kearney Milling & Elevator Co. v. Union Pacific Ry. Co.* (1896), 97 Iowa, 719, 66 N. W. R. 1059, 59 Am. St. R. 434.

to be an election.¹ After the discovery of the fraud he must not take inconsistent positions, and if he desires to exercise his election and rescind the sale he must do so before innocent third parties have acquired rights in the property, or the condition of the vendee has been altered in reliance upon his inaction, and, at all events, within a reasonable time.²

¹ Thus, in *Clough v. London & N. W. Ry. Co.*, L. R. 7 Ex. 26, the sellers did not discover the fraud until during the trial of an action which was brought against them, owing to their repossessing themselves of the goods *in pursuance of the contract*. They were then permitted to file a plea to that effect, and the jury found that the fraud was proved. See also, that the election must be with knowledge of the fraud, *Equitable Foundry Co. v. Hersee*, 103 N. Y. 25; *Pence v. Langdon*, 99 U. S. 578 (where it is said: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do"); *Kraus v. Thompson*, 30 Minn. 64, 44 Am. R. 182 (where it is held that the right of the seller to rescind for the buyer's fraud is not defeated by his having obtained judgment for the price in ignorance of the fraud, the court saying: "The invariable rule is that this right to rescind may be exercised upon discovery of the fraud, and that no acts in recognition of the existence of the contract of sale, done before such discovery, will amount to an affirmation or ratification, so as to preclude

the vendor from rescinding when the grounds for rescission are discovered," citing *Pratt v. Philbrook*, 41 Me. 132, and the *Clough* case, *supra*; *Woonsocket Rubber Co. v. Loewenberg*, 17 Wash. 29, 48 Pac. R. 785, 61 Am. St. R. 902.

² In *Barnard v. Campbell* (1874), 58 N. Y. 73, 17 Am. R. 208, it is said: "The contract of sale was defeasible at the election of the plaintiffs, the vendors, if the election was seasonably made, and the goods reclaimed in proper time, after the discovery of the fraud. The plaintiffs could lose the right by delay as against the wrong-doer, if, in consequence of such delay, his position should be changed, and they would have lost it absolutely if, during the interval between the delivery of the goods . . . and the disaffirmance of the sale by the plaintiffs, the goods had been sold to an innocent third party for a valuable consideration."

In *Clough v. London & N. W. Ry. Co.*, L. R. 7 Ex. 26, it was held that the defrauded seller had the right to exercise his election at any time after knowledge of the fraud, until he has affirmed the sale by express words or unequivocal acts; that he may keep the question open as long as he does nothing to affirm the contract; and that so long as he has made no election he retains the right to avoid it, subject to this: that if, while he is deliberating, an innocent third party has acquired an interest

§ 909. — **Evidence of election.**—The election here is between contract (*i. e.*, the contract of sale) or no contract, and whatever the seller may voluntarily do, after notice of the fraud, tending to recognize the existence of the contract, must be deemed to be evidence of an election to abide by it, and may therefore defeat a subsequent rescission. Bringing an action for the price,¹ accepting part payment thereof,² tak-

in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, he will lose his right to rescind. See also *Johnson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; *Bulkley v. Morgan*, 46 Conn. 393; *Emerson v. McNamara*, 41 Me. 565; *Hopkins v. Appleby*, 1 Stark. 477; *Stewart v. Dougherty*, 3 Dana (Ky.), 479; *Pollock v. Smith*, 49 Neb. 864, 69 N. W. R. 312; *Byrd v. Rautman*, 85 Md. 414, 36 Atl. R. 1099.

"When fully advised," say the court in *Pence v. Langdon*, 99 U. S. 578, "he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances he loses the right to rescind, and must seek compensation in damages. But the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive."

Whether the vendor has acted within a reasonable time is ordina-

rily a question of fact for the jury, to be determined in view of all the circumstances. *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. R. 796.

Reasonable time runs from the discovery of the fraud, and not from the time that seller has the necessary evidence to prove it. *Phoenix Milling Co. v. Anderson*, 78 Ill. App. 253.

¹ *Conrow v. Little*, 115 N. Y. 387, 22 N. E. R. 346, 5 L. R. A. 693; *Equitable Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. R. 487; *Hays v. Midas*, 104 N. Y. 602, 11 N. E. R. 141; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 21 N. E. R. 172, 10 Am. St. R. 479, and note, 4 L. R. A. 145, and note; *O'Bryan v. Glenn*, 91 Tenn. 106, 17 S. W. R. 1030, 30 Am. St. R. 862; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Carter v. Smith*, 23 Wis. 497; *Dibblee v. Sheldon*, 10 Blatch. 178; *Bulkley v. Morgan*, 46 Conn. 393; *Butler v. Hildreth*, 5 Metc. (Mass.) 49; *Connihan v. Thompson*, 111 Mass. 270; *Beurmann v. Van Buren*, 44 Mich. 496, 7 N. W. R. 67; *Bank of Little Rock v. Frank*, 63 Ark. 16, 37 S. W. R. 400; *Mapes v. Burns*, 72 Mo. App. 411.

Pursuing remedies equivalent to an action, such as prosecuting the claim in bankruptcy or against the

² See *Boyd v. Shiffer*, 156 Pa. St. 100, 27 Atl. R. 60; *Overton v. Brown*, 63 Mo. App. 49. See also *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. R. 913, 6 Am.

St. R. 899; *Knuckolls v. Lea*, 10 Humph. (Tenn.) 577, as to the effect of part payments.

ing security for it,¹ or accepting any other benefit under and in pursuance of the contract of sale, are common acts showing an affirmance of it. So, on the other hand, if he elects to rescind and does so, he cannot, if he fails to recover his goods, in whole or in part, subsequently bring an action for the price, or any other action based upon the theory of an existing con-

estate of a deceased purchaser, may have the same effect. See *Farwell v. Myers*, 59 Mich. 179, more fully given in later note to this section. "The claim of plaintiff to rescind is wholly inconsistent with his proof in bankruptcy of a promissory note taken for the price of the goods. *Ormsby v. Dearborn*, 116 Mass. 386;" *Seavey v. Potter*, 121 Mass. 297. But a seller of goods who, upon discovering that the sale was induced by fraud, and thereupon replevying part of the goods, subsequently proves a claim for the balance as for goods sold and delivered against the purchaser's estate in insolvency, *without objection* on the part of the assignee or of any creditor, is not thereby precluded from maintaining his action of replevin. *Raphael v. Reinstein* (1891), 154 Mass. 178, distinguishing the two cases last cited *supra*.

Demand of payment or security.—

In *Boyd v. Shiffer* (1883), 156 Pa. St. 100, 27 Atl. R. 60, there was evidence that, immediately before giving notice of rescission, the seller's agent, who acted in the matter, demanded payment or security; and this was claimed to be such an affirmance as would preclude a subsequent rescission, but this claim was denied. The court said: "Assuming this to be the correct view of the rather contradictory testimony as to what took place, it was not such an affirmance or ratification of the contract as would bar the plaintiffs of their

right to rescind; plaintiffs could accept payment or security for their goods if the fraudulent debtor chose to make the one or give the other; the fraud on them consisted in the representation, at the time of the purchase, that he was amply able to pay; the demand and refusal only demonstrated the absolute falsity of his previous representation; he gave them nothing in response to the demand, and they got nothing by it. If any note or property had passed, or there had been an assignment of any book accounts as payment or security, this would have been such an affirmance of the contract as would have been wholly inconsistent with the right of rescission, and plaintiffs' case would fail: but there was nothing of this kind,—only a demand for payment or security, a refusal, followed immediately by reclamation of the goods."

A demand for security, made by the seller's agent in ignorance of the fraud, does not prevent rescission. *Woonsocket Rubber Co. v. Loewenberg*, 17 Wash. 29, 48 Pac. R. 785, 61 Am. St. R. 902.

¹ *Joslin v. Cowee*, 52 N. Y. 90. But unsuccessful efforts to get a compromise or security do not prevent rescission unless the party does some act which evinces a clear intention to waive the right. *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. R. 330. See *Boyd v. Shiffer*, in previous note.

tract; though he may recover the value of the goods not found, either in an action based upon the theory of their conversion, or in an action based upon the contract implied by law where the vendee has disposed of the goods for money or its equivalent, and the seller has waived the tort.¹

¹ This question arose in *Farwell v. Myers* (1886), 59 Mich. 179, 26 N. W. R. 328, Am. L. Reg. (N. S.), vol. 25, (O. S.), vol. 34, p. 243. Here a debtor had made a general assignment for the benefit of his creditors. Four days afterwards J. V. Farwell & Co., who had recently sold him goods on credit, rescinded the sale on the ground that the goods had been bought with the intention not to pay for them, brought replevin against the assignee and recovered a part of the goods. After recovering judgment in the replevin suit, Farwell & Co. filed a claim with the assignee for the whole amount of their bill, giving credit on it for the value of the goods recovered by the replevin suit. Their claim was rejected by the lower court, and the supreme court, while agreeing that they might have recovered for the goods unfound, on the theory of conversion, was equally divided as to whether they could recover as for goods sold, thus affirming the decision of the court below. Said Morse, J.: "Early in the proceedings, immediately after the assignment, the plaintiffs elected to rescind the sale of the goods, and brought replevin for the same, on the theory that the fraud of the defendant had vitiated the sale, and that the goods belonged to them as if no sale had been made. After thus solemnly electing their remedy, and proceeding, through a trial, to judgment, upon the theory that they owned the goods, because they failed to get adequate relief in such suit, they cannot be allowed, a year afterward, to come into court and base a claim upon the inconsistent idea that the goods were sold to defendant. One theory is totally at variance with the other. If one elects between two inconsistent remedies, the right to pursue the other is forever lost. *Thompson v. Howard*, 31 Mich. 309; *Wetmore v. McDougall*, 32 Mich. 276; *Dunks v. Fuller*, id. 242; *Nield v. Burton*, 49 Mich. 53, 12 N. W. R. 906. We do not deny the right of plaintiffs to collect the balance, the value of the goods not recovered by the action of replevin, in a proper action for the conversion of the same; but they cannot do so upon the claim filed with the assignee, counting upon the original contract for goods sold and delivered. If they should elect to waive the tort and sue in *assumpsit*, they would yet have to declare specially averring the tort. *Tregent v. Maybee*, 54 Mich. 226, 19 N. W. R. 962." *Champlin, J.*, concurred. *Campbell, C. J.*, dissented (*Sherwood, J.*, concurring with him), saying: "There can be no doubt that, if the contract is considered as rescinded, the goods not replevied and disposed of by defendant must be accounted for in some way. Whether treated as sold or as tortiously converted, the plaintiffs, according to well-settled rules, could always sue in *assumpsit* for the proceeds or value, and could do so under the common counts or

§ 910. — **Bringing action for the deceit.**— Whether the bringing of an action for the deceit is to be deemed an affirmation of the contract is a question upon which the authorities are not in harmony. In reason, however, it would seem that it is

specially. The demand for these moneys is not one for damages at large, as for a wrong, but is a pecuniary claim based on fixed rules of recovery. . . . And it seems to me that no doctrine can be sound which puts a person to a complete election at his peril, and bars him from any adequate remedy against the wrong-doer." The plaintiffs filed a new claim based upon the conversion. It was now objected that the former claim and adjudication were a bar, but the supreme court unanimously permitted a recovery. 64 Mich. 234; 66 Mich. 678.

The position taken by Morse and Champlin, JJ., seems impregnable, so far as the right to take any further action on the contract is concerned, and is sustained by the weight of authority. Thus in *Powers v. Benedict* (1882), 88 N. Y. 605 (cited by Judge Campbell in *Farwell v. Myers*, *supra*), the sellers had rescinded the sale and brought replevin for their goods, but only found a part. The vendee subsequently became bankrupt, and the sellers filed a claim for the value of the goods not found. This act was relied upon by defendant to defeat the replevin suit. Said Danforth, J.: "The bringing of this action [the replevin suit] was undoubtedly an election to disaffirm the contract and reclaim the goods. So far as the goods are retaken, it is final and conclusive. A recovery could not afterward be had either for the price agreed to be paid for that part or their value. But it is

not perceived how this can aid the defendant. The plaintiffs, by an effort to retake their entire property, if successful in part only, do not lose the right to pursue the original wrong-doer for the value of the unfound portion. Nor is their effort to do so an answer to an action against one in whose hands they found that part. A wrong-doer carries away one hundred bags of grain; the owner recovers fifty by legal process from one who received it without consideration, and whose title is no better than that of the trespasser; does he thereby lose his right to recover the value of the remainder? Surely not. Nor is he bound to restore the fifty in order that the latter action can be maintained. *Kinney v. Kiernan*, 49 N. Y. 164. So the subsequent effort of these plaintiffs to obtain, in bankruptcy, compensation for the unfound portion of their goods is no obstacle to a recovery against a third person for so much of the fruits of the fraud as is found in his hands. *Kinney v. Kiernan*, *supra*. Nor is this conclusion against the rule of law that for one entire contract there should not be more than one action, nor concurrent suits at the same time upon one claim. The contract under which the plaintiffs parted with their goods is avoided altogether. . . . It may be conceded that the plaintiffs could neither sue the vendee for the price of goods embraced in the replevin suit, nor make it the foundation of proceedings in bankruptcy. They

not *per se* an affirmance, but that the question must depend largely upon the nature and extent of the relief obtained or demanded.¹

have neither sought to do so, nor attempted to rescind in part only. They rescind altogether. If they succeed in this action they will obtain part of the goods belonging to them, and so far as they can collect in bankruptcy, it will be as compensation for goods taken and appropriated by the wrong-doer to his use, *and from which conversion the law implies a promise to pay*. But whether the claim is thus regarded, or as one for damages for conversion, it is provable under the bankrupt law. U. S. Rev. St., § 5067."

So in *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. R. 201, 10 Am. St. R. 377, it is said: "Having rescinded the contract of sale, and not finding all the goods so as to take them in replevin, the plaintiffs might have sued in trover for the conversion of the remainder. The vendee having disposed of the goods for his own benefit, the plaintiffs might waive the tort and maintain *assumpsit* for the proceeds, *not upon the original contract of sale which had been rescinded*, but upon the implied promise to pay for property wrongfully appropriated."

After rescission the contract of sale is at an end (*Moller v. Tuska* (1881), 87 N. Y. 166; *Kinney v. Kieran* (1872), 49 N. Y. 164); but the seller after rescinding and getting back part of the goods may recover damages for the fraud as to the residue. *Hersey v. Benedict*, 15 Hun (N. Y.), 282.

In *Heinze v. Marx* (1893), 4 Tex. Civ. App. 599, 23 S. W. R. 704, it is held that an action to recover part of the goods found upon rescission is not

to be defeated because of a *subsequent* action which was, in form, an action for the price of the goods not found, but which, the court suggest, may be regarded not as an action for their price but for their value.

In *Johnson v. Stratton* (1894), 6 Tex. Civ. App. 431, an action, in nature like that of *Sleeper v. Davis*, *supra*, was sustained, that case being cited with approval.

In *Morford v. Peck* (1878), 46 Conn. 380, where, before rescission, part of the goods had been sold, and the seller on rescission brought attachment in an action of *assumpsit* for their proceeds, and replevin for the residue, it was held that if the object of the attachment was merely to recover these proceeds, which could be reached in no other way, then the suit in attachment would not be an affirmance of the sale and would not prevent the recovery of the residue in replevin.

¹ In *Kimball v. Cunningham* (1808), 4 Mass. 502, 3 Am. Dec. 230, Chief Justice Parsons held that the commencement of an action for deceit was an election to consider the contract as subsisting. But in *Emma Silver Mining Co. Lim. v. Emma Silver Min. Co. of N. Y.* (1880), 7 Fed. R. 401, it is said: "There are several cases which appear to hold that an action to recover damages for deceit in a sale does not imply an affirmance of the contract, but is consistent with its disaffirmance. *Hersey v. Benedict*, 15 Hun (N. Y.), 282; *Whitney v. Allaire*, 1 N. Y. 305; *Hubbell v. Neigs*, 50 N. Y. 480; *Henderson v. Lacon*, L. R. 5 Eq. 249."

§ 911. — Election to rescind bars personal remedies.—

If, instead of pursuing personal remedies, the seller rescinds, that also, of course, is an election, and, like the other, a conclusive one; hence he cannot afterwards pursue personal or other remedies based upon the theory that the title is still in the buyer.¹

§ 912. Must rescind in toto—Rescission as to term of credit only.—If the seller would rescind the contract he must, if it be an entire one, rescind it *in toto*. He will not be permitted to make a partial rescission or to cull out from the contract those elements which he deems of advantage to him and affirm those while he repudiates the residue.² Thus, where a

And in that case it was held that bringing an action of deceit against an agent who had effected the fraud was no bar to a disaffirmance as against his principal. See also some general remarks in *Bacon v. Brown*, 4 Bibb (Ky.), 91; and *Dean v. Yates*, 22 Ohio St. 388.

A vendor who rescinds the sale and retains the property cannot maintain an action for deceit against the vendee. *Roome v. Jennings*, 2 N. Y. Misc. 257.

¹ Thus, if the seller rescinds, he cannot afterwards exercise the right of stoppage *in transitu*, which is based upon the theory that the title is in the buyer. *Kearney Milling & Ele. Co. v. Union Pacific Ry. Co.* (1896), 97 Iowa, 719, 66 N. W. R. 1059, 59 Am. St. R. 431.

² *Voorhees v. Earl*, 2 Hill (N. Y.), 288, 38 Am. Dec. 588; *Costigan v. Hawkins*, 22 Wis. 74, 94 Am. Dec. 583; *Clark v. Baker*, 5 Metc. (Mass.) 452; *Morse v. Brackett*, 98 Mass. 205; *Miner v. Bradley*, 22 Pick. (Mass.) 457.

"The entirety of the contract is not destroyed by the circumstance that the subject of the sale is of such

uniform character as to be readily divisible proportionally by weight or measure, or is contained in packages of uniform quantity and value, even with the added circumstance that the consideration is named only by way of fixing the rate or price of the unit of such division. *Clark v. Baker*, 5 Metc. 452; *Morse v. Brackett*, 98 Mass. 205." Per Wells, J., in *Mansfield v. Trigg*, 113 Mass. 350.

A contract for the sale of eight bags of wool, bearing the same distinctive mark, being shown to a purchaser as one lot, and sold to him at the same time at so much per pound, is an entire contract, and he cannot rescind it in part on discovering that the wool in one of the bags was of a different kind. *Morse v. Brackett*, 98 Mass. 205. A contract for the sale of a cargo of corn, consisting of two varieties, at one price for the white and another price for the yellow corn, is entire, and the buyer cannot take part and reject the rest. *Clark v. Baker*, 5 Metc. 452. A contract for a cow and four hundred pounds of hay at a lump sum is entire, and, if the seller refuse to deliver a portion, the

contract of sale upon a term of credit has been procured by the buyer's fraud, the seller, if he would rescind, must rescind the whole of it, and he cannot, by the weight of authority certainly, disaffirm it only as to the term of credit and then sue for the price at once.¹ It is of course possible that there may be two contracts respecting the sale and the credit, or a divisible one respecting the same matters which would permit of a partial rescission, but it cannot be done of an entire contract.

§ 913. — Rescission as to mode of payment only.—Where, however, he sells goods under a special contract, procured by fraud, as to the mode of payment — as, for example, where he agrees to take in payment the note of a third person fraudulently represented to be solvent,— he may rescind this special contract and, upon restoring what he has received under it, may maintain *indebitatus assumpsit* for the goods.²

§ 914. Must restore consideration.—In order to rescind, the party attempting it must, at the time of rescission, restore,

vendee, if he retains the other, cannot recover the money paid in an action for money paid or money had and received; but his action should be on the contract for damages. *Miner v. Bradley*, 22 Pick. 457. A contract for the sale of a lot of clothing comprising several different suits at a fixed price each is entire, and the purchaser is not bound to receive a part only of the lot contracted for. *Smith v. Lewis*, 40 Ind. 98. A contract for the sale of a number of slaves at a gross sum is entire. *Norris v. Harris*, 15 Cal. 226. A contract for the sale of a patent is entire, and if the vendee uses part of the patented processes he must pay royalties as agreed in the entire contract. *Palmer's Appeal*, 96 Pa. St. 106.

But a contract for the sale of four thousand barrels of oil to be delivered in eight different lots on eight differ-

ent dates, and to be paid for as delivered, is not entire for the whole four thousand barrels. *Morgan v. McKee*, 77 Pa. St. 228.

¹ *Kellogg v. Turpie* (1879), 93 Ill. 265, 34 Am. R. 163 [citing *Read v. Hutchinson*, 3 Camp. 351; *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C., M. & R. 312; *Selway v. Fogg*, 5 M. & W. 83; *Allen v. Ford*, 19 Pick. 217; *Dellone v. Hull*, 47 Md. 112; *Whitlock v. Heard*, 3 Rich. (S. C.) 88].

In New York the contrary has been held. *Roth v. Palmer*, 27 Barb. 652; *Wigand v. Sichel*, 3 Keyes. 120; *McGoldrick v. Willits*, 52 N. Y. 612; *Heilbronn v. Herzog*, 33 App. Div. 311. This rule applied in *Jaffray v. Wolf* (1896), 4 Okl. 303, 47 Pac. R. 496.

² *Mann v. Stowell*, 3 Pin. (Wis.) 220; *Willson v. Foree*, 6 Johns. (N. Y.) 110; *Pierce v. Drake*, 15 Johns. 475.

or at least offer to restore, to the other whatever of value he has received from him by way of consideration for the contract;¹ and, as a general rule, he cannot rescind unless the other party can be thus placed *in statu quo*. As stated by the supreme judicial court of Massachusetts: "If he elects to rescind the sale he must return and restore to the other party the whole of the consideration, whether money, goods or securities, received by way of consideration for the sale, which may be of any value to either party."²

§ 915. — **Note of vendee or a stranger.**—The other party's own note received by way of consideration, and remaining un-negotiated in the hands of the seller, forms somewhat of an exception to the rule, for it is sufficient if this be restored to him upon the trial;³ but the note of a third person forms

¹This rule does not require a restoration of expenses which the fraudulent vendee has incurred in furtherance of his fraudulent schemes, as, for example, the *freight* which he has paid upon the goods (Case Plow Works v. Ross, 74 Mo. App. 437; Chamberlin v. Fuller, 59 Vt. 247; Lee v. Simmons, 65 Wis. 523); or a *tax* which he has paid the government to get the goods out of a United States bonded warehouse. Guckenheimer v. Angevine, 81 N. Y. 394.

But it is otherwise where the payment was made on the account of the seller, as where it was agreed that the buyer, on paying the freight, might deduct it from the purchase price. Parks v. Lancaster (Tex. Civ. App.), 38 S. W. R. 262.

²Thayer v. Turner, 8 Metc. (Mass.) 550. To same effect: Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Conner v. Henderson, 15 Mass. 319, 8 Am. Dec. 103; Burton v. Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Perley

v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Fay v. Oliver, 20 Vt. 118, 49 Am. Dec. 764; Babcock v. Case, 61 Pa. St. 427, 100 Am. Dec. 654; Schwartz v. McCloskey, 156 Pa. St. 258, 27 Atl. R. 300; Brown v. Norman, 65 Miss. 369, 4 S. R. 293, 7 Am. St. R. 663; Berry v. Insurance Co., 132 N. Y. 49, 30 N. E. R. 254, 28 Am. St. R. 548; Thompson v. Peck, 115 Ind. 512, 18 N. E. R. 16, 1 L. R. A. 201; Vance v. Schroyer, 79 Ind. 380; Haase v. Mitchell, 58 Ind. 213; Potter v. Titcomb, 22 Me. 300; Tisdale v. Buckmore, 33 Me. 461; Herman v. Haffenegger, 54 Cal. 161; Bishop v. Stewart, 13 Nev. 25; Smith v. Smith, 30 Vt. 139; Crossen v. Murphy, 31 Oreg. 114, 49 Pac. R. 858; Frink v. Thomas, 20 Oreg. 265, 25 Pac. R. 717, 12 L. R. A. 239; Merrill Chem. Co. v. Nickells, 66 Mo. App. 678; Friend Bros. Clothing Co. v. Hulbert, 98 Wis. 183, 73 N. W. R. 784 (citing other Wisconsin cases).

³Seller need not restore the buyer's note, given for goods fraudulently purchased, before rescinding the sale and suing for the goods whether the

no exception and must be restored at the time of the rescission.¹

§ 916. — **Things of no value.**—The rule stated requires the restoration of that “which may be of any value to either party,” and it is therefore unnecessary to restore an article

note be negotiable or not, if it remains in the seller's hands and is produced at the trial. *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, 33 Am. Dec. 700. To same effect: *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Dayton v. Monroe*, 47 Mich. 193; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. R. 547; *Wood v. Garland*, 58 N. H. 154; *Coghill v. Boring*, 15 Cal. 213; *Ladd v. Moore*, 3 Sandf. (N. Y.) 589; *Crossen v. Murphy*, 31 Oreg. 114, 49 Pac. R. 858; *Sloane v. Shiffer*, 156 Pa. St. 59, 27 Atl. R. 67; *Wilcox v. San José Fruit Packing Co.*, 113 Ala. 519, 21 S. R. 376, 59 Am. St. R. 135.

Contra.—*Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. R. 875, is *contra*, although in the earlier case of *Ryan v. Brant*, 42 Ill. 78, the other rule was approved. Under the Illinois statute a tender of the note on the trial will prevent judgment for defendant. *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. R. 500. Where the note of the debtor is deemed *prima facie* payment of the debt the note must be returned before rescission. *Thompson v. Peck*, 115 Ind. 512, 18 N. E. R. 16, 1 L. R. A. 201.

If the note of the purchaser and a third person is taken it must be restored before rescission. *Moriarty v. Stofferan*, 89 Ill. 528.

Where A sold B's horse to C as the horse of A, taking C's note to the order of A, and A indorsed it over to B, it was held that if B would rescind for false representations made by C to A, he must, at the time, re-

turn the note to C. *Pangborn v. Ruemenapp*, 74 Mich. 572, 42 N. W. R. 78.

¹ *Coolidge v. Brigham*, 1 Metc. (Mass.) 547; *Cook v. Gilman*, 34 N. H. 556; *Baker v. Robbins*, 2 Denio (N. Y.), 136; *Whitcomb v. Denio*, 52 Vt. 382; *Spencer v. St. Clair*, 57 N. H. 9, unless he can prove the note to be absolutely worthless. *Estabrook v. Swett*, 116 Mass. 303; *Duval v. Mowry*, 6 R. I. 479. And this exception is denied unless there is some other evidence of worthlessness than the maker's insolvency. *Crossen v. Murphy*, 31 Oreg. 114, 49 Pac. R. 858. See also *Frost v. Lowry*, 15 Ohio, 200.

In an action against part of a number of wrong-doers they cannot complain that a note executed by another of the number, not sued, was not returned. *Stubly v. Beachboard*, 68 Mich. 401, 36 N. W. R. 192.

In an action of replevin against the vendee's transferee with notice of the fraud, it was held that the defendant could not raise the question whether plaintiff had returned to the vendee his note received from him. *Stevens v. Austin*, 1 Metc. (Mass.) 557. A stranger to the contract when sued for the goods cannot complain that the purchaser's note was not returned to him if the latter does not object. *Frost v. Lowry*, 15 Ohio, 200. To same effect: *Schoonmaker v. Kelly*, 42 Hun (N. Y.), 299; *Pearse v. Pettis*, 47 Barb. (N. Y.) 276; *Manning v. Albee*, 11 Allen (Mass.), 520; *Bassett v. Brown*, 105 Mass. 551.

which is clearly worthless, such as a counterfeit bill,¹ a forged² or worthless note,³ a worthless machine,⁴ and the like.⁵ "But it is not sufficient," says the same learned court, in speaking of this rule, "that they are of no intrinsic value, or of no market value. If they are capable of serving any purpose of advantage by their possession or control, or if their loss was a disadvantage to the other party in any way, he is entitled to have them returned."⁶

§ 917. — When defendant not interested.— An exception to the requirement of restoration exists also where the action is against a third party, who has taken the goods with notice of the fraud or not in good faith for value, and who has no interest in the return of the consideration.⁷

§ 918. — Restoration impossible or inequitable — Goods damaged or partly sold.— Restoration of an article in its original condition may also be excused where, by natural causes or reasonable or contemplated use, the value of the property is diminished;⁸ or where it is necessarily destroyed in discovering the fraud or in making such a use or test of it as the parties contemplated should be made;⁹ or where return is rendered impossible by the act of the defrauding

¹ *Kent v. Bornstein*, 12 Allen (Mass.), 342. So of counterfeit United States bonds, redeemed by the United States after the sale. *Brewster v. Burnett*, 125 Mass. 68, 28 Am. R. 203. See also *Perley v. Balch*, 23 Pick. (Mass.) 283.

² *Haase v. Mitchell*, 58 Ind. 213.

³ *Mahone v. Reeves*, 11 Ala. 345.

⁴ *Dill v. O'Ferrell*, 45 Ind. 268.

⁵ See also *Sanford v. Dodd*, 2 Day (Conn.), 437 (a worthless deed).

⁶ *Bassett v. Brown*, 105 Mass. 551. "This rule is held with great strictness in actions at law," said the court, "as in the case of the casks that contained worthless lime (*Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103), and the sack that covered

the rejected bale of cotton. *Morse v. Brackett*, 98 Mass. 205, and 104 Mass. 494."

⁷ *Manning v. Albee*, 11 Allen (Mass.), 520; s. c., 14 Allen, 7, 92 Am. Dec. 736; *Stevens v. Austin*, 1 Metc. (Mass.) 557; *Bassett v. Brown*, 105 Mass. 551; *Frost v. Lowry*, 15 Ohio, 200; *Schoonmaker v. Kelly*, 42 Hun (N. Y.), 290; *Pearse v. Pettis*, 47 Barb. (N. Y.) 276. See also the last note to preceding section, § 915.

⁸ See *Brown v. Norman*, 65 Miss. 369, 4 S. R. 293, 7 Am. St. R. 663; *Gatling v. Newell*, 9 Ind. 572.

⁹ *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Gatling v. Newell*, 9 Ind. 572.

party.¹ And it has been held unnecessary to return a part payment where the vendee has damaged the property to an amount greater than such payment,² or where such restoration would otherwise be inequitable or unjust,³ as where the buyer has already disposed of more goods than he has paid for.

¹ *Gates v. Raymond* (1900), 106 Wis. 657, 82 N. W. R. 530; *Masson v. Bovet*, 1 Denio (N. Y.), 69, 43 Am. Dec. 651; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Hammond v. Pennock*, 61 N. Y. 145; *Faulkner v. Klamp*, 16 Neb. 174, 20 N. W. R. 220. See also *Friend Bros. Clothing Co. v. Hulbert*, 98 Wis. 183, 73 N. W. R. 784; *Gay v. Osborne*, 102 Wis. 641, 78 N. W. R. 1079.

The mere fact, however, that, before discovery of the fraud, the vendor has parted with all or a part of the consideration, will not relieve him of the necessity to restore it. He must regain possession of it and tender it, or otherwise place the vendee *in statu quo*. *Hemphill v. Miller*, 75 Ill. App. 488; *Smith v. Brittenham*, 98 Ill. 188.

² *Phoenix Iron Works Co. v. McEvony*, 47 Neb. 228, 66 N. W. R. 290, 53 Am. St. R. 527.

³ "That a party seeking rescission of a contract must return, or offer to return, what he has received under it, and thus put the other party as nearly as is possible in his situation before the contract, is the law. But this rule is wholly an equitable one; impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required." *Sloane v. Shiffer*, 156 Pa. St. 59, 27 Atl. R. 67. In this case goods were, through fraudulent representations, obtained from time to time during an interval of six months. For about two-thirds of the goods notes had been given. Some

of the earlier notes were paid, but at the time of the discovery of the fraud the others and the open account were unpaid. The seller rescinded and, on the trial, tendered back the unpaid notes. It appeared that the purchasers had realized more for goods which they had sold before the rescission than they had paid on the notes, and it was held that the sellers were not bound to return the amount of these payments. So in *Schofield v. Shiffer*, 156 Pa. St. 65, 27 Atl. R. 69, growing out of the same transactions, it was held that where goods are sold under fraudulent representations, and all are delivered under one contract of sale, the sellers may rescind without tendering back to the vendees the portion of the purchase-money paid where it appears that the value of the goods reclaimed does not exceed the balance due the sellers. And so where the vendee has sold part of the goods to innocent third parties, the vendor, on rescission, may retain of the consideration an amount equal to the value of the goods so sold, and may restore the residue. *Tootle v. First Nat. Bank*, 34 Neb. 863, 52 N. W. R. 396; *Symms v. Benner*, 31 Neb. 593, 48 N. W. R. 472; *Crane Boot & Shoe Co. v. Trentman*, 34 Fed. R. 620.

Severable contracts—Application of payments.—Where sales are made upon credit at different times through a period of several months, each sale may be treated as distinct for the

§ 919. — **Restoration in actions of trover.**— So, where the object of the seller's action is not, as in replevin, to obtain the specific goods themselves, but rather, as in trover, to obtain their value in money, it has been held that the plaintiff is not bound to restore part payments in money which he had received from the purchaser, but that the same may be deducted from the amount he would otherwise be entitled to recover.¹ And the court in Rhode Island, in recent cases,² en-

purposes of restoration; and where the payments made do not exceed the amount of the first sale, all may be deemed as applying upon that purchase unless at the time the payor made a different application. The subsequent sales may therefore be rescinded without restoring any of these payments. *Friend Bros. Clothing Co. v. Hulbert*, 98 Wis. 183, 73 N. W. R. 784.

Rescinding compromise — Seller not obliged to return his own goods.— So, where the buyer of goods intended to defraud the seller, and with like intent makes a compromise with him in pursuance of which he returns part of the goods and agrees to pay for the residue, the seller, on rescinding this compromise for fraud, is not obliged first to restore to the buyer the goods so returned by him. *Munzer v. Stern* (1895), 105 Mich. 523, 63 N. W. R. 513, 55 Am. St. R. 468.

¹ *Warner v. Vallily*, 13 R. I. 483. See also *Ladd v. Moore*, 3 Sandf. (N. Y.) 5-9; *Schoonmaker v. Kelley*, 42 Hun (N. Y.), 290; *Crossen v. Murphy*, 31 Oreg. 114, 49 Pac. R. 858.

² *Sisson v. Hill* (1893), 18 R. I. 212, 21 L. R. A. 206, 26 Atl. R. 196. Said the court, per Matteson, C. J.: "This is an action of replevin to recover goods which the plaintiffs allege that the defendant fraudulently obtained from them under the guise of con-

tracts of sale. The only goods with which we are concerned in the present inquiry are those obtained on September 25, 1891. For these the defendant paid the plaintiffs \$50 in cash, and also gave them certain notes. The plaintiffs returned these notes to the defendant before bringing the suit, but they retained the money, claiming at the trial that the goods replevied were less in amount than the goods obtained from them by \$100. The court below instructed the jury that, if the plaintiffs elected to rescind the contract of sale of September 25, 1891, they should have returned both the money and the notes before suit, and that, having failed to return the money, they could not recover the goods. The plaintiffs excepted to this instruction, and now petition for a new trial on the ground that it was erroneous. There are undoubtedly numerous cases which support the instruction. We have no disposition to find fault with the application of the rule to cases of executory contracts of sale, in which a party seeks to rescind the contract on the ground of the failure of the other to fulfill his part of the contract, and which it is said in *Duval v. Mowry*, 6 R. I. 479, 487, constitute most of the cases in which a return has been held necessary before an action can be brought. This court,

deavoring to enforce equitable principles, has declined to "hold that the rigid rule of tender before action, known to rescission under and by virtue of a contract, applies to cases of the avoid-

however, has never been disposed, apparently, to apply the rule, any further than may be necessary, to cases of the avoidance of contracts on the ground of fraud. In *Duval v. Mowry*, id. 479, 485, Chief Justice Ames remarks: 'But we do not hold that the rigid rule of tender before action, known to rescission under and by virtue of a contract, applies to cases of the avoidance of a contract on the ground of fraud. In the former case the pursuing party is dealing with one presumed to be honest, and can afford to wait; in the latter, with one who has defrauded him in the very matter of the suit; and he should be delayed by no useless ceremony in the way of the prompt recaption of his goods, or of the service of his writ in a suit for damages for the tortious conversion of them. Such a condition to a remedy in such a case is wholly unknown in courts of equity, where cases of the rescission and cancellation of contracts on the ground of fraud usually come; the court deeming it quite sufficient to provide that justice be done to the injurious as well as to the injured party, by its own action. . . . No good reason can be given why, when courts of law deal with the rescission of contracts on the ground of fraud, they should not do so, so far as the nature of their remedies will permit, upon the same footing with courts of equity.' And see also *Warner v. Vallily*, 13 R. I. 483, 484, in which the court refused to apply the rule to an action of trover in a case in which the ven-

dor had received money only as a part of the consideration.

"Two reasons have been stated for the rule. One is the protection of the vendee. With reference to this it may be said that, while the substantial rights of the fraudulent person who is proceeded against should, undoubtedly, be preserved, the person who has been deprived of his property by fraud under the guise of a contract of sale ought not to be defeated, delayed or embarrassed by technicalities or useless ceremonies. The fraudulent vendee is in no position to demand anything more than protection that the vendor at the same time that he obtains' justice shall do justice. A return or tender of the consideration, especially when it consists merely of money or promissory notes or like securities, before the bringing of the suit, is not necessary to the protection of the vendee, since the court in which the action is pending can compel such return, so far as may be necessary to do justice to the vendee, by making it a condition of its judgment, or by withholding its judgment, or staying execution on it, until a compliance with its order for such return.

"The other reason, and perhaps the one more frequently assigned, for the rule, is purely technical. It is that the vendor cannot rescind the contract and retain the money, because he cannot rescind it in part and affirm it in part, but must rescind *in toto*, if at all. Chief Justice Durfee, in *Warner v. Vallily*, above,

ance of a contract on the ground of fraud," and has permitted replevin to be maintained in such cases, requiring the plaintiff to repay as a condition of recovery any excess of money re-

clearly shows how fallacious is this reason when applied to cases of the avoidance of contracts of sale on the ground of fraud. He says: 'It is here assumed that the vendor, if he keeps the money, can only keep it in part fulfillment of the contract. But is it necessarily so? The position of the vendor is that he has been swindled out of his goods under the guise of a contract, the contract and the money paid on it being a part of the artifice or contrivance by which the fraud was consummated. He keeps the money, not as a part fulfillment of the contract, but as part indemnity for the fraud which has been perpetrated on him, intending to deduct it in his action. The question is, will the law permit him to do so? Will it allow him to keep as indemnity what he received as consideration? We do not see why it will not, for *ex hypothesi* he was deceived into receiving it as consideration by the vendee, and therefore came under no obligation to him to keep it as such, nor still less to return it before bringing suit for the tort. The vendee, considering his fraud, gets all, if not more than, he merits when he is allowed a reduction *pro tanto* in damages.'

"In accordance with these views it has been held that in cases in which the vendor has received from the fraudulent vendee money as a part of the consideration, and in which he sues in trover for the recovery of pecuniary damages for the conversion of the goods obtained by the fraud, he may retain the money,

and allow it to go in reduction of the damages to be recovered. Warner v. Vallily, 13 R. I. 483; Ladd v. Moore, 3 Sandf. 589. So, too, it has been held in numerous cases in which the plaintiffs have sued in trover, that when the fraudulent vendee has given his note, or even the note or other obligation of a third person, as the consideration, in whole or in part, for the goods obtained, it is not necessary for the vendor to return, or offer to return, such note or obligation before suit, but that it is enough if he bring it into court to be impounded at the trial for the benefit or protection of the vendee. Duval v. Mowry, 6 R. I. 479; Thurston v. Blanchard, 22 Pick. 18; Frost v. Lowry, 15 Ohio, 200; Nellis v. Bradley, 1 Sandf. 560; Ladd v. Moore, 3 Sandf. 589; Coghill v. Boring, 15 Cal. 213. Why should not the same reasons apply to an action of replevin as have been applied to an action of trover, and which have led the courts to except it from the operation of the rule requiring that the consideration received by a vendor, if consisting of money or promissory notes or like securities, be returned or tendered before suit? A vendor cannot know before the service of his writ of replevin how many of the goods which have been fraudulently obtained from him can be recovered. Why should he not be permitted to retain the money or securities which he has received as an indemnity for the loss sustained by the fraud? Why should he be required, especially in a case like the

ceived by him over the damage to his property and the value of goods not recovered. These cases are, however, exceptional.

one at bar, to surrender the money in his hands, and take the chances of recovering it again in an action of trover from the fraudulent vendee. 'A bird in hand is worth two in the bush.' The \$50 in cash which the plaintiffs have may be worth more to them than a judgment for many times that sum against the defendant. As has been stated, all that the defendant is entitled to is protection and the court can afford him that by requiring the plaintiff to pay into the court for the benefit of the defendant whatever sum, if any, the plaintiff has received in excess of the value of the goods disposed of by the defendant prior to the service of the writ of replevin, either before rendering judgment, or by staying execution, until a compliance with its order for such payment. We are aware that in *Wheaton v. Baker*, 14 Barb. 594, the court makes a distinction, in this respect, between an action of trover and an action of replevin; and this distinction was recognized in our own case of *Warner v. Vallily*, above, but we fail to perceive any just ground for the distinction, at least in a case like the present. In *Poor v. Woodburn*, 25 Vt. 234, 239, which was replevin for goods procured by purchase through fraudulent misrepresentations of the purchaser as to the value of the note of a third person given in payment for them, no tender of the note was made before the action. Chief Justice Redfield remarks: 'The party who would rescind a contract of this kind must, no doubt, be in a condi-

tion to put the other party *in statu quo*. If, for instance, he had parted with the note, he could not regain the property, even when he proved the most unequivocal fraud. And upon the trial he should, if required so to do by the opposite party, furnish the note, to be disposed of under the direction of the court.' And see also *Nichols v. Michael*, 23 N. Y. 264, which was an action under the code, substituted for the former action of replevin, to recover possession of goods alleged to have been fraudulently obtained, and in which the vendee had given his negotiable promissory note for the goods. It was held that the vendor was not bound to tender such note at the time of rescinding the contract, but that it was sufficient for him to produce it at the trial, and place it in the custody of the court. And see also *Schoonmaker v. Kelly*, 42 Hun, 299, in which the plaintiffs were allowed to maintain replevin for goods fraudulently obtained from them on tendering at the trial to the defendant, who was the general assignee for the benefit of the creditors of the fraudulent vendee, the balance of the money paid by the vendee, after deducting the value of the goods disposed of by the vendee before the replevy and the depreciation in value of the goods replevied. We are of the opinion that the court below erred in its instruction to the jury in the matter excepted to, and that the plaintiffs' petition for a new trial should be granted."

§ 920. — **Restoration waived.**— An actual restoration may, moreover, be waived, as where the buyer refuses to receive the thing, or puts his refusal to return the goods upon some other ground.¹

§ 921. — **Keeping tender of restoration open.**— A person entitled to rescind performs ordinarily his duty when he has offered in good faith to restore what he has received under the contract. The fact that the other party refuses to receive the property or to acquiesce in the rescission does not defeat the termination of the contract.² Neither is the defrauded party obliged to keep and preserve the property at his own risk. In a case in which the fraud was on the part of the seller, the court said: "It is not true that one who is the victim of a fraud, and who, discovering the facts, rescinds the contract and offers to return the property, which is refused by the seller, is obligated to keep the property for the seller until the end of the controversy between them, so that he may return it to him upon recovery of the purchase price. A purchaser who is defrauded by the seller, and who in the lawful exercise of his right to rescind tenders the property to the seller, who refuses to receive it, is under no other obligation to him than to retain the property as his agent and bailee, and, after notice of his intention, may in good faith dispose of the same for account of the owner. If he sells the property otherwise than in good faith, the extent of his liability would be the fair market value of the same."³

¹ As in *Leon v. Goldsmith*, 69 Ill. App. 22, where the seller, desiring to rescind, said: "I will give you back the notes, and you give me back the goods;" to which the buyer replied: "I won't do that; not at present, anyhow." *Held*, a sufficient offer to rescind, and that a formal tender of the notes was not necessary.

² *Porter v. Leyhe*, 67 Mo. App. 540.

³ *Hambrick v. Wilkins* (1887), 65 Miss. 18, 3 S. R. 67, 7 Am. St. R. 631.

In *Barnett v. Speir* (1894), 93 Ga. 762, 21 S. E. R. 168, the party claiming to be defrauded in a horse trade tendered back the horse received by him, but it was refused. He then brought trover for the value of his own horse, and later sold the horse tendered. *Held*, that this would not bar his action, but that the value of the horse sold might go in mitigation of damages.

§ 922. **Who may rescind.**—The right to rescind, as a general rule, belongs to the defrauded party only; it may not be exercised either by the guilty party or a mere stranger.¹ But inasmuch as the purpose is to recover property, on the ground that the title never passed, whoever succeeds in law to the seller's rights of property may exercise this right. Thus the assignee for the benefit of the seller's creditors, his administrators, or the general purchaser of his assets, may rescind and recover the goods.²

§ 923. **Against what parties rescission may be enforced — Any one not a bona fide purchaser for value.**—The contract of sale induced by fraud being voidable merely and not void, it is of course operative until rescinded. Until that time the buyer, though he hold by a defeasible title, is still the owner of the goods, with the rights and powers incident to such an ownership. He may sell, mortgage or assign them, and by so doing may pass at least his own defeasible title, and to a *bona fide* holder for value without notice he may transfer a perfect title. The right of the seller, therefore, to recover his goods upon rescission is limited to the buyer and those who have acquired from him no more than his own defeasible title. The seller, in other words, may recover his goods either from the buyer himself or from any transferee of his who is not a *bona fide* purchaser for value without notice of the fraud.³ It will

¹ *Gunther v. Ullrich* (1892), 82 Wis. 222, 52 N. W. R. 88, 33 Am. St. R. 32.

² *Reeder Bros. Shoe Co. v. Prylinski* (1894), 102 Mich. 468, 60 N. W. R. 969.

³ "Where goods are obtained by fraud, the vendor may reclaim them against all persons except a *bona fide* purchaser without notice." *Atwood v. Dearborn*, 1 Allen (Mass.), 483, 79 Am. Dec. 755. "Several things must concur to bar the claim of the defrauded vendor: 1. He must have parted with possession of his property with intent to pass the title to the wrong-doer, thus giving him the

apparent right of disposal. If property is taken feloniously or without the consent of the owner, the taker can make no title to it, even to an innocent purchaser for value. 2. A third party must have acquired title from the wrong-doer without notice of the defects in his title, or knowledge of circumstances to put him to an inquiry as to the source of his title. And 3. Such third party must have parted with value upon the faith of the apparent title of the wrong-doer and his right to dispose of the property. If any of these ele-

be kept in mind that we are now dealing with cases where the seller intended to sell and to sell to the particular purchaser, though his consent was induced by fraud, and not with cases where he did not intend to sell or did not intend to sell to the person who obtained the goods. In such cases, as has been seen, not even a *bona fide* transferee will acquire title.¹

§ 924. — **Assignees, mortgagees, creditors, etc.**—Among the transferees from whom the seller may recover are the purchaser's assignee or receiver in bankruptcy or insolvency,² cred-

ments are wanting, the vendor, seasonably pursuing his legal right, may have his property." *Barnard v. Campbell* (1874), 58 N. Y. 73, 17 Am. R. 208.

Seller cannot reclaim against a *bona fide* purchaser for value without notice who has bought the goods from the original vendee. *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Root v. French*, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; *Wineland v. Coonce*, 5 Mo. 296, 32 Am. Dec. 320; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Jennings v. Gage*, 13 Ill. 610, 56 Am. Dec. 476; *Sinclair v. Healy*, 40 Pa. St. 417, 80 Am. Dec. 589; *Fawcett v. Osborn*, 32 Ill. 411, 83 Am. Dec. 278; *Le Grand v. National Bank*, 81 Ala. 123, 1 S. R. 460, 60 Am. R. 140; *Kern v. Thurber*, 57 Ga. 172; *Old Dominion St. Co. v. Burckhardt*, 31 Gratt. (Va.) 664; *Williamson v. Russell*, 39 Conn. 406; *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491, 51 N. E. R. 105; *Moyce v. Newington*, L. R. 4 Q. B. Div. 32; *Kingsford v. Merry*, 11 Ex. 577.

But seller may recover from any one not a *bona fide* purchaser for value without notice. See cases cited *supra*; *Redpath v. Brown*, 71 Mich. 258, 39 N. W. R. 51; *Caldwell v. Bowen*, 80 Mich. 382, 45 N. W. R. 185;

Edson v. Hudson, 83 Mich. 450, 47 N. W. R. 347; *McGraw v. Solomon*, 83 Mich. 442, 47 N. W. R. 345; *Schloss v. Feltus*, 96 Mich. 619, 55 N. W. R. 1010; *Webster v. Bailey*, 40 Mich. 641; *Shipman v. Seymour*, 40 Mich. 274.

One who has bought the goods from the vendee with knowledge of his fraud or under circumstances sufficient to put a reasonably prudent man upon inquiry cannot claim protection. *Sheuer v. Goetter*, 102 Ala. 313, 14 S. R. 774; *Hudson v. Bauer Grocery Co.*, 105 Ala. 200, 16 S. R. 693; *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 57 Fed. R. 685, 60 id. 341, 6 C. C. A. 508, 8 C. C. A. 652, 24 L. R. A. 417.

One member of a firm of purchasers having knowledge of the fraud, all will be charged with notice. *Huthmacher v. Lowman*, 66 Ill. App. 448.

Burden of proof is on the subsequent purchaser to show that he bought without notice. *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. R. 217; *Standard Oil Co. v. Meyer Bros. Drug Co.*, 74 Mo. App. 446.

¹ See *ante*, § 888.

² *Donaldson v. Farwell*, 93 U. S. 631; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. R. 101; *Bussing v. Rice*, 2 Cush. (Mass.), 48; *Clark v. Flint*, 22 Pick.

itors who have seized the goods upon attachment or execution against the buyer,¹ pledgees, mortgagees or assignees in security or payment of an antecedent debt,² unless they have at the time parted with value, released securities or otherwise changed

(Mass.), 231, 33 Am. Dec. 733; Belding v. Frankland (1881), 8 Lea (Tenn.), 67, 41 Am. R. 630; Goodwin v. Massachusetts Loan & T. Co., 152 Mass. 189, 25 N. E. R. 100; Shipman v. Seymour, 40 Mich. 274; Farley v. Lincoln, 51 N. H. 577, 12 Am. R. 182; Silberman v. Munroe, 104 Mich. 352, 62 N. W. R. 555; Gullledge v. Slayden-Kirksey Mills, 75 Miss. 297, 22 S. R. 952. *Contra*, Wickham v. Martin (1856), 13 Gratt. (Va.) 427.

¹Thaxter v. Foster (1891), 153 Mass. 151, 26 N. E. R. 434; Wiggin v. Day, 9 Gray (Mass.), 97; Jordan v. Parker (1869), 56 Me. 557; Buffington v. Gerish, 15 Mass. 156, 8 Am. Dec. 97; Atwood v. Dearborn, 1 Allen (Mass.), 483, 79 Am. Dec. 755; Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 10 N. W. R. 900, 42 Am. R. 53; Goodwin v. Massachusetts Loan & T. Co., 152 Mass. 189, 25 N. E. R. 100; White v. Mitchell, 38 Mich. 390; American Exp. Co. v. Willsie, 79 Ill. 92; Poor v. Woodburn, 25 Vt. 234; Bidault v. Wales, 20 Mo. 546, 64 Am. Dec. 205; Truxton v. Fait (1899), 1 Pennw. (Del.) 483, 42 Atl. R. 431, 73 Am. St. R. 81.

²The rule of the text is sustained by the great weight of authority. Hurd v. Bickford, 85 Me. 217, 35 Am. St. R. 353, 27 Atl. R. 107; Sleeper v. Davis (1886), 64 N. H. 59, 6 Atl. R. 201; Henderson v. Gibbs (1888), 39 Kan. 679, 18 Pac. R. 926; Eaton v. Davidson (1889), 46 Ohio St. 355, 21 N. E. R. 442; Stevens v. Brennan (1879), 79 N. Y. 254; Barnard v. Campbell (1874), 58 N. Y. 73, 17 Am. R. 208; McGraw v. Solomon, 83 Mich. 442, 47

N. W. R. 345; Edson v. Hudson, 83 Mich. 450, 47 N. W. R. 347; Hyde v. Ellery, 18 Md. 496; Work v. Jacobs, 35 Neb. 772, 53 N. W. R. 993; Phoenix Iron Works Co. v. McEvony, 47 Neb. 228, 66 N. W. R. 290, 53 Am. St. R. 527; Wolf v. Lachman (Tex. Civ. App.), 20 S. W. R. 867; Hamilton-Brown Shoe Co. v. Lyons, 6 Tex. Civ. App. 633, 25 S. W. R. 805; Dinkler v. Potts, 90 Ga. 103, 15 S. E. R. 690; Woonsocket Rubber Co. v. Loewenberg, 17 Wash. 29, 48 Pac. R. 785, 61 Am. St. R. 902; Peninsular Stove Co. v. Ellis, 20 Ind. App. 491, 51 N. E. R. 105; Belleville Pump Works v. Samuelson, 16 Utah, 234, 52 Pac. R. 282; Case Plow Works v. Ross, 74 Mo. App. 437; Fait & Slagle Co. v. Truxton, 1 Pennw. (Del.) 24, 29 Atl. R. 457; Commercial Nat. Bank v. Pirie, 82 Fed. R. 799, 49 U. S. App. 596, 27 C. C. A. 171; Cox Shoe Co. v. Adams, 105 Iowa, 402, 75 N. W. R. 316.

Contra: Butters v. Haughwout (1866), 42 Ill. 18, 89 Am. Dec. 401; Shufeldt v. Pease (1863), 16 Wis. 659; Lee v. Kimball, 45 Me. 172 (explained in Hurd v. Bickford, *supra*), which hold that one who takes in payment of an antecedent debt is a *bona fide* holder. But these cases have not been generally approved. See Barnard v. Campbell, *supra*.

In Barnard v. Campbell, 58 N. Y. 73, 17 Am. R. 208, *supra*, it appeared that on August 21, 1863, one Jeffries had contracted to sell to Campbell & Co. a quantity of linseed, and they gave him their note on that day in payment for it. Jeffries did not have

their position to their prejudice in reliance upon the vendee's apparent power so to transfer the goods to them.¹

Where the purchaser's transferee has only partly paid for the goods he can be deemed a *bona fide* purchaser simply to the extent of his payments made in good faith and before notice.²

§ 925. — **Following proceeds as a trust fund.** — The seller may not only recover the goods themselves or their value from the original purchaser or those who stand in his place, but he may, in many cases, where the goods themselves have passed into the hands of a *bona fide* holder, recover their proceeds from the estate of the purchaser. He may do this, as a rule, in accordance with well-established principles in equity, wherever he can trace and identify the proceeds, and until they come into the hands of a holder whose equities are greater than his own. Thus, in the leading case upon this question,³ it appeared that the fraudulent vendee, soon after selling part of the goods to *bona fide* purchasers, had made an assignment for the benefit of creditors. The residue of the goods and the

the seed at the time, but on August 24th he purchased it without payment by fraudulent representations, from Barnard & Co., and sent it to Campbell & Co. On August 27th, Jeffries failed, not having paid Barnard & Co. for the seed, and they replevied it from Campbell & Co. *Held*, that they were entitled to recover it. See S. C., 55 N. Y. 456, 14 Am. R. 289.

¹ *Spira v. Hornthall* (1884), 77 Ala. 137; *Barnard v. Campbell* (1874), 58 N. Y. 73, 17 Am. R. 208.

Payments or advances made upon the goods, in good faith at the time of the transfer, are of course protected. *Kingsford v. Merry*, 11 Ex. 577; *Babcock v. Lawson*, L. R. 4 Q. B. Div. 394; *Moyce v. Newington*, id. 32.

² *Schloss v. Feltus*, 96 Mich. 619, 55 N. W. R. 1010; *Dixon v. Hill*, 5 Mich. 404; *Kohl v. Lynn*, 34 id. 360; *Webster v. Bailey*, 40 id. 641; *McGraw v.*

Solomon, 83 id. 442; *Hoffman v. Strohecker*, 7 Watts (Pa.), 86, 32 Am. Dec. 740; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; *Mill Co. v. Finley* (Tex. Civ. App.), 34 S. W. R. 311.

³ *American Sugar Refining Co. (plaintiff) v. Fancher (assignee)* (1895), 145 N. Y. 552, 40 N. E. R. 206, 27 L. R. A. 757.

The seller can follow identified proceeds into the hands of a corporation to which fraudulent vendee has transferred his assets without consideration. *Sheffield v. Mitchell*, 31 App. Div. (N. Y.) 266, 52 N. Y. Supp. 925. He may also recover what he can identify in the hands of the vendee's administrator (*Howell v. Berger*, 19 N. Y. Misc. 315, 44 N. Y. Supp. 259), or his assignee for creditors. *Phoenix Milling Co. v. Anderson*, 73 Ill. App. 253.

claims for the part sold came into the possession of the assignee. The purchaser rescinded the sale, replevied the goods not sold and demanded the proceeds of those sold. The assignee, however, collected these demands, and the seller brought this action to recover the proceeds. "The identification of the proceeds sought to be reached was complete and unquestioned," and the seller was permitted to recover.

§ 926. —. "An assignee for creditors," said the court, "is not a purchaser for value, and stands in no other or better position than his assignor, as respects a remedy to reach the proceeds of the sales." "It is claimed that the general creditors of the firm will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent firm. But general creditors have no equity or right to have appropriated, to the payment of their debts, the property of the plaintiff or property to which it is equitably entitled as between it and the original purchaser."

§ 927. —. But in a somewhat similar case¹ it appeared that, before the seller rescinded, the goods had not only been sold but the identity of their proceeds entirely lost; it was held, applying the same principles, that equity would not declare the whole of the insolvent's estate to be a trust fund and impress upon it a lien for the seller's benefit to the exclusion of the other creditors of the insolvent.

§ 928. **Necessity of demand before action.**—The fraudulent vendee obtains possession of the goods wrongfully, and as to him, therefore, except where there is consideration to be previously restored, no formal notice of rescission or demand for the goods is necessary before beginning action for their recovery. The suit itself is a sufficient notice and demand.²

¹Farwell v. Kloman (1895), 45 Neb. 424, 63 N. W. R. 798.

²"We think the plaintiffs were entitled to maintain their action with-

out a previous demand. Such demand and a refusal to deliver are evidence of conversion when the possession of the defendant is not tor-

The same rule has been applied also to those who have obtained the goods from such vendee with notice of the fraud or without parting with value for them, upon the ground that they stood in no better or different situation than the vendee himself.¹ Other cases, however, have held that if before rescission the property had been transferred even to one who had paid no value, as, for example, to the vendee's assignee for the benefit of creditors, a demand is necessary because the possession of the transferee was lawful.²

tious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, or any person taking under him, other than a *bona fide* purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods." Per Shaw, C. J., in *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, 33 Am. Dec. 700. To same effect: *Buffington v. Gerrish*, 15 Mass. 156, 8 Am. Dec. 97; *Bussing v. Rice*, 2 Cush. (Mass.) 48; *Acker v. Campbell*, 23 Wend. (N. Y.) 372; *Bancroft v. Blizzard*, 13 Ohio, 30; *Carl v. McGonigal*, 58 Mich. 567, 25 N. W. R. 516; *Reeder v. Moore*, 95 Mich. 594, 55 N. W. R. 436; *Warner v. Vallily*, 13 R. I. 483.

"It is quite well settled that when goods have been obtained by fraud by a vendee, or otherwise unlawfully obtained, the vendor, or true owner, may, without previous demand, maintain trover or replevin for the goods, against any person not holding them as an innocent purchaser for value." *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. R. 875.

¹ Demand is not necessary before bringing replevin against purchas-

er's assignee in insolvency (*Koch v. Lyon*, 82 Mich. 513, 46 N. W. R. 779; *Burnham v. Ellmore*, 66 Mo. App. 617), or a sheriff who has levied upon the goods. *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. R. 875 (citing *Bussing v. Rice*, 2 Cush. (Mass.) 48; *Acker v. Campbell*, 23 Wend. (N. Y.) 372; *Bancroft v. Blizzard*, 13 Ohio, 30); *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573.

² In *Goodwin v. Wertheimer* (1885), 99 N. Y. 149, 1 N. E. R. 404, the court said: "The defendant Wertheimer is the assignee of Goldsmith & Co., the fraudulent vendees, under a general assignment made by them to the defendant for the benefit of creditors, and had possession of the goods in question as part of the assigned property at the time of the commencement of this action. But he was not a purchaser for value, and he acquired no better title, as against the plaintiff, than his assignors had at the time of the assignment. The trial court dismissed the complaint on the ground that there was no proof that the goods were demanded of Wertheimer before bringing the action. It is not claimed that Wertheimer was cognizant of the fraud committed by Goldsmith & Co. The legal title to the goods at the time of the assignment was in Goldsmith

§ 929. —. Where demand upon the transferee of the vendee is necessary a demand upon the vendee alone will not suffice; and this is true, it has been held, even though the vendee may be in possession of the goods as the servant or agent of the transferee, it not appearing that the transferee had authorized a refusal or that demand upon the transferee in person was impracticable.¹ The fact that the transferee in his pleading sets up title to the goods in himself was further held not to waive the necessity of a demand.²

III.

OF FRAUD UPON THE BUYER.

§ 930. **Methods of defrauding.**— The methods by which the buyer may be defrauded, like those by which the seller may be deceived, are almost numberless. In the main, however, they will relate either to the title, quality, quantity or value of the article, and they will be considered in that order.

§ 931. **Misrepresentations concerning title.**— As will be seen hereafter,³ the sale of a chattel in the possession of the seller carries with it an implied warranty of title in the seller, but there may also be active misrepresentations concerning the title which will justify the buyer in repudiating the contract, or in maintaining an action for the deceit.⁴ Misrepresentations

& Co., no proceeding having been taken by the plaintiff to rescind the sale until after the assignment had been made. The defendant Wertheimer, therefore, lawfully acquired the title and possession of the goods, but subject to the same right of reclamation in the plaintiffs, upon their rescinding the contract, as they before had against the assignors. The original possession of Wertheimer being lawful and not tortious, it was necessary to change the character of his possession by a demand and refusal before the plaintiffs could main-

tain an action against him for conversion or to recover the goods. Addison on Torts, 312; Holbrook v. Wight, 24 Wend. 169; Mount v. Derrick, 5 Hill, 455; Pierce v. Van Dyke, 6 Hill, 613." Approved in Converse v. Sickles (1895), 146 N. Y. 200, 40 N. E. R. 777, 48 Am. St. R. 790.

¹ Goodwin v. Wertheimer, *supra*.

² Goodwin v. Wertheimer, *supra*.

³ See *post*, § 1300 *et seq.*

⁴ "There is no doubt if the vendor fraudulently represents the goods sold to be his own, when he knows them to belong to a stranger, an ac-

concerning the existence or continuance of liens or charges would have the same effect.¹

§ 932. Misrepresentations concerning quality.—Fraudulent representations made by the seller concerning the quality or character of the goods, by which the buyer is deceived, will justify the latter in repudiating the sale,² or, at his option, in

tion on the case lies to recover damages therefor, though the real owner has not recovered the property, nor the vendee suffered any actual damage." Per Nelson, C. J., in *Case v. Hall* (1840), 24 Wend. (N. Y.) 102, 35 Am. Dec. 605 (citing *Cross v. Gardner*, 1 Show. 68; *Dale's Case*, Cro. Eliz. 44; *Medina v. Stoughton*, 1 Salk. 210; s. c., 1 Ld. Raym. 593).

To sell mortgaged goods without disclosing that fact is such fraud as will justify rescission. *Merritt v. Robinson* (1880), 35 Ark. 483.

¹ False statements made by the seller's agent to the effect that liens or charges against the title had been removed will justify rescission. *Halsell v. Musgrave*, 5 Tex. Civ. App. 476, 24 S. W. R. 358.

To misrepresent the number and extent of the incumbrances on the property is such fraud as will justify rescission. *Stevenson v. Marble* (1897), 84 Fed. R. 23.

² In *Whitworth v. Thomas* (1887), 83 Ala. 308, 3 S. R. 781, 3 Am. St. R. 725, where Thomas was seeking to recover from Whitworth a mule he had traded with the latter for a mare which he alleged was unsound, the court said: "There is no pretense in this case that there was any warranty of soundness of the mare. The scope of the contention is that the mare was unsound; that the fact was known to Whitworth, but unknown to Thomas; and that, in nego-

tiating the trade, Whitworth represented that she was sound so far as he knew, and by means thereof induced Thomas to make the trade. If these were the facts, they armed Thomas with the right to rescind, if seasonably and properly demanded. The demand would be seasonable and proper if he tendered the mare back with no undue delay after discovering the deceit practiced upon him. 3 *Brickell's Digest*, 736, secs. 78-80; *Perry v. Johnston*, 59 Ala. 648; 2 *Parsons on Contracts*, bottom page 920; 3 *Wait's Actions and Defenses*, 432, 455, 456. If a seller knows the horse to be unsound, and informs the buyer that he is sound so far as he knows, and the buyer not knowing the contrary, nor able to discover it by ordinary observation, relies on such representation and consummates the trade, this, if injury result from it, constitutes a fraud, and the buyer is authorized to rescind if he demand it within a reasonable time after discovering the fraud."

See also that the buyer may rescind: *Croyle v. Moses*, 90 Pa. St. 250, 35 Am. R. 654; *McCorkell v. Karhoff*, 90 Iowa, 545, 58 N. W. R. 913; *Hoyle v. Southern Saw Works*, 105 Ga. 123, 31 S. E. R. 137; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. R. 922; *Spaulding v. Hanscom*, 67 N. H. 401, 32 Atl. R. 154.

Where sale of bonds of no value is made by false representations as to

maintaining an action for the deceit.¹ A representation, also, not a term of the contract and not amounting to a warranty, but false in fact, will likewise justify rescission where it was a material inducement to the contract,² even though it were not so intentionally false as to sustain an action for deceit under the stricter rule laid down in such cases as *Derry v. Peek*.³ Whether the mere breach of a warranty unaccompanied by fraud will justify rescission is a question upon which there is much conflict of authority.⁴

§ 933. — **Buying “with all faults.”**—Of course, if the buyer expressly buys the article “with all faults,” he cannot usually be heard to complain that he has been defrauded;⁵ though even this result might be shown to have been accomplished by fraudulent artifice,⁶ or it might appear that the expression “with all faults” had acquired a limited signification which did not include the one in question.⁷

their kind or character, buyer may recover his money. *Ripley v. Case* (1889), 78 Mich. 126, 43 N. W. R. 1097, 18 Am. St. R. 428. An action will lie for falsely representing that a note sold is unpaid. *Sibley v. Hulbert* (1860), 15 Gray (Mass.), 509.

¹In *Hexter v. Bast* (1889), 125 Pa. St. 52, 17 Atl. R. 252, 11 Am. St. R. 874, it is said: “If a person is thrown off his guard and deceived by a false and fraudulent warranty, it is sufficient, to prove the warranty broken, to establish the deceit (*Addison on Torts*, 1181), for one will be presumed to know of the existence or non-existence of a fact which he undertakes to warrant.”

On a false and fraudulent warranty, the buyer, at his option, may sue in *assumpsit* on the warranty or in deceit for the fraud. *Mahurin v. Harding* (1833), 28 N. H. 128, 59 Am. Dec. 401 [citing *Stuart v. Wilkins*, 1

Doug. 21; *Williamson v. Allison*, 2 East, 446; *Wallace v. Jarman*, 2 Stark. 162; *Wardell v. Fosdick*, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; *Cravins v. Gant*, 4 T. B. Mon. (Ky.) 126].

²See the discussion of this question, *ante*, § 863. See also *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189, 25 N. E. R. 100; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. R. 560.

³See *ante*, § 876.

⁴See *ante*, §§ 816–819.

⁵*Smith v. Andrews* (1848), 8 Ired. (N. C.) 3; *Pearce v. Blackwell* (1851), 12 id. 49; *Baglehole v. Walters*, 3 Camp. 154; *Bywater v. Richardson*, 1 Ad. & El. 503.

⁶*Schneider v. Heath*, 3 Camp. 506. And the same is true where the article, *e. g.*, a horse, is sold “sound or unsound.” *West v. Anderson* (1831), 9 Conn. 107, 21 Am. Dec. 737.

⁷As in *Whitney v. Boardman* (1875), 118 Mass. 242.

§ 934. — Misrepresentations must have deceived buyer.

Here also, as has been already seen,¹ the representation must be made as of a matter of fact, and not as a mere expression of opinion.² And here, also, the misrepresentation must have been material and must have deceived the buyer; but, while the buyer must ordinarily use his eyes and avail himself of opportunities open for information, still, if the parties are not on equal footing, or the seller uses artifice to allay suspicion or prevent investigation, the seller cannot escape responsibility for fraudulent misrepresentations by asserting that the vendee too confidently relied upon them or too implicitly believed them.³

§ 935. Concealment of latent defects.— As has been seen in earlier sections,⁴ the active concealment of the truth and the intentional concealment of material and latent defects known to the seller and unknown to the buyer are, by the weight of authority, tantamount to fraudulent representations. The buyer deceived by them will therefore be justified in rescinding the sale or suing in tort for the deceit.⁵ All the more so,

¹ See *ante*, § 871.

² Thus an assertion by the seller of a patent right that it is valid and does not interfere with any former patent must be regarded as the mere expression of an opinion, unless it appears that the seller knew of a prior patent covering the same ground. *Reeves v. Corning*, 51 Fed. R. 774. So also *Huber v. Guggenheim*, 89 Fed. R. 598.

³ See *ante*, § 881. See also *Strand v. Griffith* (1899), 38 C. C. A. 444, 97 Fed. R. 854 [citing *Chamberlin v. Fuller*, 59 Vt. 256, 9 Atl. R. 832; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. R. 448, 10 L. R. A. 606; *Warder v. Whitish*, 77 Wis. 430, 46 N. W. R. 540; *Graham v. Thompson*, 55 Ark. 299, 18 S. W. R. 58; *Hale v. Philbrick*, 42 Iowa, 81]; *National Bank of Dakota*

v. Taylor (1894), 5 S. Dak. 99, 58 N. W. R. 297.

⁴ See §§ 568, 869, and cases cited.

⁵ On a sale for a "sound price," a failure to disclose a latent defect, which, if known, would deter the buyer from purchasing, and which would ordinarily escape the attention of a buyer, is fraudulent. *McAdams v. Cates* (1857), 24 Mo. 223; *Barron v. Alexander* (1858), 27 Mo. 530; *Grigsby v. Stapleton* (1887), 94 Mo. 423, 7 S. W. R. 421. To sell a promissory note without disclosing that the maker is, to the seller's knowledge, insolvent, is fraudulent under the Georgia code. *Gordon v. Irvine* (1898), 105 Ga. 144, 31 S. E. R. 151.

To fail to disclose the blindness of a horse where it was not apparent to

of course, is this true, as in the preceding section, where the seller uses artifice to conceal the defect or to ward off inquiry,¹

the buyer is a fraud which will justify an action. *Hughes v. Robertson* (1824), 1 T. B. Mon. (Ky.) 215, 15 Am. Dec. 104. To the same effect: *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. R. 552; *Stevens v. Fuller* (1837), 8 N. H. 463; *Paddock v. Strobridge* (1857), 29 Vt. 470; *Cardwell v. McClelland* (1855), 35 Tenn. (3 Sneed), 150. All the more so where the seller declared the animal "all right." *Moncrief v. Wilkinson* (1890), 93 Ala. 373.

To sell a bull which the seller knows is being bought for breeding purposes, without disclosing that the bull was, to the seller's knowledge, impotent, though there was no active deceit, will render the seller liable for damages in an action for deceit. *Maynard v. Maynard* (1877), 49 Vt. 297.

To sell animals known to be afflicted with contagious diseases, without disclosing that fact, is also such a fraud as will justify rescission or action for damages. *Wintz v. Morrison* (1856), 17 Tex. 372, 67 Am. Dec. 658; *Grigsby v. Stapleton* (1887), 94 Mo. 423, 7 S. W. R. 421; *Jeffrey v. Bigelow* (1835), 13 Wend. (N. Y.) 518, 28 Am. Dec. 476 (*a fortiori* where the seller actively misleads as to the nature of the disease); *George v. Johnson* (1845), 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; *State v. Fox* (1894), 79 Md. 514, 24 L. R. A. 679.

¹In *Raeside v. Hamm* (1893), 87 Iowa, 720, 54 N. W. R. 1079, seller knew that a horse sold had a serious disease; he misrepresented its character and severity, gave the horse medicine to conceal the symptoms, and thus effected the sale. The horse soon after

died from the disease. *Held*, fraud which would defeat a recovery of the price and justify recovery by vendee for time and money spent on the horse. See also *Timmis v. Wade*, 5 Ind. App. 139, 31 N. E. R. 827. So where, on the sale of a horse known by the seller to be unsound in a certain respect, the seller conceals the defect, and gives evasive and artful answers to inquiries, with the intent to deceive, and thereby deceives and injures the purchaser, the latter may rescind. *Croyle v. Moses* (1879), 90 Pa. St. 250, 35 Am. R. 654. So where on the sale of a mule and a horse the seller made representations concerning them, under circumstances evidently designed to prevent examination of them, it was held that he must be deemed to have warranted even against defects which would otherwise have been open to discovery upon examination. *Kenner v. Harding* (1877), 85 Ill. 264, 28 Am. R. 615. So the statement of part of the truth only, in regard to the soundness of a horse, when inquiry was made respecting it, was held equivalent to false representation. *Graham v. Stiles* (1865), 38 Vt. 578. And a statement by the seller of a horse that the horse was sound so far as he knew was held fraud, where it appeared that the seller then had good and reasonable grounds to believe that the horse was unsound, but did not disclose such grounds. *Wheeler v. Wheelock* (1861), 34 Vt. 553; *Whitworth v. Thomas* (1887), 83 Ala. 308, 3 S. R. 781, 3 Am. St. R. 725.

So, where the buyer of a monument, noticing what seemed to be (and were in fact) defects in the

or so purposely limits investigation as to prevent the discovery of the truth.¹

§ 936. Representations as to value.—Representations concerning the worth or value of an article, or the amount for which it could or may be sold, are usually nothing more than the mere expression of an opinion respecting a subject upon which either party may easily acquaint himself. It is to be expected ordinarily that the seller of goods will seek to enhance their price by decided if not extravagant declarations concerning their value, and the buyer, it is presumed, will measure these declarations accordingly, even if he does not seek, on his part, to depreciate the goods by equally positive or extravagant assertions. Where parties thus deal at arm's length and on equal footing, it is well settled that false representations concerning the worth or value of the goods sold will neither sustain an action nor warrant rescission.² Where, however, one party has peculiar means of knowledge not open to the other, or where

granite, was told by the seller that they were simply rust stains from iron bands in which the stone had been shipped, and would wash off with the first heavy rain. *Wegenaar v. Dechow*, 33 N. Y. App. Div. 12.

¹In *Beasley v. Huyett & Smith Mfg. Co.* (1893), 92 Ga. 273, 18 S. E. R. 420, the court said: "There can be no doubt that it is a fraud for manufacturers of machinery to fill it with latent defects not discoverable in thirty days, and then sell it as good, but warranting the same only as against defects actually discovered within thirty days, they knowing that the existing defects are not discoverable within that time, and concealing both the defects and their knowledge of them."

So, in *Stewart v. Wyoming Rancho Co.* (1888), 128 U. S. 383, to make false representations concerning the property and to induce the buyer to rely

on these and not to make inquiries of others is held to be fraud.

²"No action will lie," said *Bronson, J.*, "for a false representation by the vendor concerning the value of the thing sold; it being deemed the folly of the purchaser to credit the assertion. And besides, value is matter of judgment and estimation about which men may differ." *Van Epps v. Harrison* (1843), 5 Hill (N. Y.), 63, 40 Am. Dec. 314. To same effect: *Deming v. Darling* (1889), 148 Mass. 504, 20 N. E. R. 107, 2 L. R. A. 743; *Poland v. Brownell* (1881), 131 Mass. 138, 41 Am. R. 215; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. R. 623; *Page v. Parker* (1861), 43 N. H. 363, 80 Am. Dec. 172; *Chrysler v. Canaday* (1882), 90 N. Y. 272, 43 Am. R. 166; *Neidefer v. Chastain* (1880), 71 Ind. 363, 36 Am. R. 198; *Evans v. Gerry* (1898), 174 Ill. 595, 51 N. E. R. 615.

Especially is this true where the

a special trust or confidence is reposed by one party in the opinion of the other, the rule is different; and it is equally well settled that false representations or false expressions of opinion as to value, intended to deceive, and accomplishing that result, are to be regarded as fraud and entitle the defrauded party to his remedy.¹

article was open to inspection and the buyer was qualified to judge for himself (*Griffith v. Strand*, 19 Wash. 686, 54 Pac. R. 613); and where both parties were equally familiar with the facts and the buyer had ample opportunity to inform himself. *Weaver v. Shriver* (1894), 79 Md. 530, 30 Atl. R. 189.

A representation by the seller, fraudulently made, that stock is worth eighty per cent. of its par value, will not sustain an action for deceit (*Ellis v. Andrews* (1874), 56 N. Y. 83, 15 Am. R. 379, and valuable note); nor a representation that a bond sold was an A No. 1 bond and the security good (*Deming v. Darling* (1889), 148 Mass. 504, 20 N. E. R. 107, 2 L. R. A. 743); nor that a patented machine will work "effectually" and "rapidly" (*Neidefer v. Chastain, supra*); nor the amount of the crop which given plants or vines will yield (*Holton v. Noble* (1890), 83 Cal. 7, 23 Pac. R. 58); nor that a corporate bond was "just as good as gold, and was just as good as wheat in the bin and worth \$1,000" (*French v. Fitch* (1887), 67 Mich. 492, 35 N. W. R. 258); nor a representation that one "is making a good trade" (*Brady v. Cole* (1896), 164 Ill. 116, 45 N. E. R. 438); nor a statement that the buyer will make profit on the article bought (*Terhune v. Coker* (1899), 107 Ga. 352, 33 S. E. R. 394).

Representations concerning the value of land will not be deemed

fraudulent where the boundaries are pointed out and it is open to inspection. *Gordon v. Parmelee* (1861), 2 Allen (Mass.), 212; *Mooney v. Miller* (1869), 102 Mass. 217.

Private offers of third persons, even if *bona fide*, are not evidence of value. *Hine v. Manhattan R. Co.* (1892), 132 N. Y. 477, 30 N. E. R. 985, 15 L. R. A. 591, and cases cited.

¹Said Brewer, J. (then of the supreme court of Kansas, now of the United States supreme court), in *Graffenstein v. Epstein* (1880), 23 Kan. 443, 33 Am. R. 171: "Sometimes there are such relations between the parties, or their situations are such, that a peculiar obligation rests on the one who knows to reveal his knowledge. There may be some trust relation between the two, or a recognized habit of dealing in dependence upon the party's statements or representations. In such cases there is a peculiar duty resting upon the party to disclose the true facts. A confidential adviser, an attorney, a factor, an agent, all hold such relations that they are under special duty to tell the truth, the whole truth, and nothing but the truth. So where from a long-continued course of dealing the party making the representations knows that the other has become accustomed to act upon his representations, he may not presume upon such confidence to impose a falsehood. So, also, where there are peculiar means

§ 937. — **Market value.**— Statements as to market value stand upon the same footing, for this is usually a matter open

of knowledge possessed by one and not open to the other. as where a dealer in precious stones trades with one inexperienced and ignorant of the values of such articles. Acquaintance with such values, or the tests of quality, is not acquired at once, or by the mere asking; it requires training and time. So if a dealer knows that a party is confined to his room by injury or disease, and compelled to depend on the information brought to him — and indeed, generally, where the parties cannot, by reasonable care and diligence, place themselves upon equal terms, the law casts a higher obligation to reveal the truth."

Representations as to value in connection with an extrinsic fact calculated to throw the buyer off his guard will sustain an action. *Miller v. Barber* (1876), 66 N. Y. 558. See also *Coles v. Kennedy* (1890), 81 Iowa, 360, 25 Am. St. R. 503, 46 N. W. R. 1088. Representations concerning the value of the good-will of a business are actionable, as this is a matter peculiarly within the knowledge of the seller. *Byrne v. Stewart* (1889), 124 Pa. St. 450, 17 Atl. R. 19.

Where the sale is to an infant, unfamiliar with values, the question whether representations of value deceived him should be left to the jury. *Welch v. Olmstead* (1893), 90 Mich. 492, 51 N. W. R. 541.

Where the seller knows that the buyer is wholly ignorant of the value of the property, and knows that he is relying upon the seller's representation, and such representation does not take the form of a mere expression

of opinion, and is in the nature of a statement of fact, the rule of *caveat emptor* does not necessarily apply. *Maxted v. Fowler* (1892), 94 Mich. 106, 53 N. W. R. 921 (citing *Picard v. McCormick*, 11 Mich. 68; *Manning v. Albee*, 11 Allen, 520; *Lawton v. Kittredge*, 30 N. H. 500; *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144; *Miller v. Barber*, 66 N. Y. 558; *Gerhard v. Bates*, 2 El. & Bl. 476, 20 Eng. L. & Eq. 129). *Peck v. Jenison* (1894), 99 Mich. 326, 58 N. W. R. 312, is to the same effect.

"The expression of an opinion by the vendor can never be made actionable, if false, unless it be so strong, and based upon such superior knowledge, to the extent that it is relied upon as true, and reasonably so by the vendee, as a fact, and known to be thus relied upon by the seller." *Collins v. Jackson* (1884), 54 Mich. 186, 19 N. W. R. 947.

An intending purchaser of bank stock is entitled to rely upon the statement of the president as to the condition of the bank, without making further inquiry. *Merrill v. Florida Land Co.*, 60 Fed. R. 17, 8 C. C. A. 444. So an intending purchaser of a patent, whose value lies largely in the cost of manufacturing goods under it, may rely upon the seller's statements as to such cost. *Braley v. Powers* (1898), 92 Me. 203, 42 Atl. R. 362.

In *Picard v. McCormick* (1862), 11 Mich. 68, it is said per Campbell, J.: "It is undoubtedly true that value is usually a mere matter of opinion; and that a purchaser must expect that a vendor will seek to enhance his wares, and must disregard his

to inquiry by either party.¹ Representations, however, respecting the cost of an article, or the price at which it was bought

statements of their value. But, while this is generally the case, yet we are aware of no rule which determines arbitrarily that any class of fraudulent misrepresentations can be exempted from the consequences attached to others. Where a purchaser, without negligence, has been induced by the arts of a cheating seller to rely upon material statements which are knowingly false, and is thereby damnified, it can make no difference in what respect he has been deceived, if the deceit was material and relied on. It is only because statements of value can rarely be supposed to have induced a purchase without negligence that the authorities have laid down the principle that they cannot usually avoid a bargain. But value may frequently be made by the parties themselves the principal element in a contract; and there are many cases where articles possess a standard commercial value, in which it is a chief criterion of quality among those who are not experts. It is a matter of every-day occurrence to find various grades of manufactured articles known more generally by their prices than by any test of their quality which can be furnished by ordinary inspection. Frauds are easily committed by dishonest dealers, by confounding these grades, and cannot be detected in many cases except by persons of experience. In the case before us the alleged fraud consisted of false statements by a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably supposed to understand. The dealer knew of the purchaser's

ignorance, and deliberately and designedly availed himself of it to defraud him. We think that it cannot be laid down as a matter of law that value is never a material fact; and we think the circumstances of this case illustrate the impropriety of any such rule. They show a plain and aggravated case of cheating. And it would be a deserved reproach to the law if it exempted any specific fraud from its remedial action where a fact is stated and relied upon, whatever may be the general difficulty of defrauding by means of it."

¹ "However justly the moralist may censure the address sometimes resorted to by men of keen business habits to effect advantageous contracts, misrepresentations as to the value or quantity of a commodity in market, when correct information on those subjects is equally within the power of both contracting parties with equal diligence, do not, in contemplation of law, constitute fraud." *Foley v. Cowgill* (1838), 5 Blackf. (Ind.) 18, 32 Am. Dec. 49. Followed as to market value in *Cronk v. Cole*, 10 Ind. 485; *Graffenstein v. Epstein*, 23 Kan. 443, 33 Am. R. 171.

"*Prima facie*, a statement to an experienced dealer in hops as to the market value of the article he is asked to buy is dealer's talk on a subject about which the seller has a right to assume that the buyer will make up his mind for himself, the means of information being equally open to both." Per Holmes, J., in *Lilienthal v. Suffolk Brewing Co.* (1891), 154 Mass. 185, 28 N. E. R. 151, 26 Am. St. R. 234, 12 L. R. A. 821 (citing *Manning v. Albee*, 11 Allen,

or sold, stand upon obviously different ground; and though many courts apply to them the rule of immunity extended to declarations of opinion like that of value,¹ others, with better

520; Poland v. Brownell, 131 Mass. 138, 41 Am. R. 215; Deming v. Darling, 148 Mass. 504, 20 N. E. R. 107, 2 L. R. A. 743, and the other cases cited *supra* in this note). And it was therefore held that, though the seller had fraudulently misstated the market price to an experienced dealer who said he did not believe it and took measures to protect himself by contract, he could not claim to have been defrauded.

¹ Holbrook v. Connor (1872), 60 Me. 578, 11 Am. R. 212; Hemmer v. Cooper (1864), 8 Allen (Mass.), 334; Cooper v. Lovering (1870), 106 Mass. 77; Gassett v. Glazier, 165 Mass. 473, 43 N. E. R. 193; Richardson v. Noble (1885), 77 Me. 390; Bishop v. Small (1874), 63 Me. 12; Long v. Woodman (1870), 58 Me. 49; Martin v. Jordan (1872), 60 Me. 531; Elerick v. Reid (1895), 54 Kan. 579, 38 Pac. R. 814; Sowers v. Parker (1898), 59 Kan. 12, 51 Pac. R. 888; Mackenzie v. Seeburger, 76 Fed. R. 108, 40 U. S. App. 198, 22 C. C. A. 83.

"No action lies against a man for his declaring that a certain person would have given him a certain sum for his farm, though no such offer was ever made. It is a mere ground of estimation, with which no prudent man should be satisfied." Roberts on Fraud, 523, cited with approval in Cross v. Peters, 1 Greenl. (Me.) 376, 10 Am. Dec. 78; Adams' Cas. on Sales, 211, and Holbrook v. Connor, *supra*. But see, *contra*, Ives v. Carter (1856), 24 Conn. 392; Moline Plow Co. v. Carson, 72 Fed. R. 387, 36 U. S. App. 448, 18 C. C. A. 606.

In Holbrook v. Connor, *supra*, the court say: "The statement of the vendor that he paid a certain price for his land, if true, can be no more than an indication of his opinion of its value; and when we consider the various motives which may, and often do, actuate men in making their purchases, and especially when it is done for the purposes of speculation, it is but the slightest proof of such an opinion. It is certainly of no more value than the offer of a third person, and this is considered of so little worth that it is not legal testimony in a case where the market price is in issue. It is, however, claimed that the price paid is a definite fact, the truth or falsity of which is susceptible of satisfactory proof, while assertions of quality and value are necessarily matters of opinion which are too uncertain for judicial cognizance. This may be true, and the same may be said of offers made as well as many other representations not actionable. But it should also be remembered that a misrepresentation, to be the foundation of an action, must relate not only to an existing fact, but to a material one,—one which will enable the purchaser more intelligently to form his own opinion of the value of the property. Now, as we have already seen, the price paid, if correctly stated, is but an uncertain indication of the vendor's opinion. It gives no light whatever as to any inherent fixed quality or description which goes to make up the value, and, in this respect, is not distin-

reason, regard them, when expressly made, as representations of fact which will be fraudulent where they were falsely made and have misled the other.¹

guishable from an offer made, except that it is even more unreliable as an indication of value."

False statements as to the price at which property was appraised are not actionable. *Bourn v. Davis* (1884), 76 Me. 223. And a statement that goods "were billed to me" at a certain price, greater than the real price, was said in Massachusetts not to "go beyond the limits allowed to vendors by what long has been understood to be the law of the Commonwealth." *Way v. Ryther*, 165 Mass. 226, 42 N. E. R. 1128. But this court has declared its intention not to extend the limits "of such lying talk as dealers may indulge in with legal impunity." *Kilgore v. Bruce*, 166 Mass. 136.

¹ *Sandford v. Handy* (1840), 23 Wend. (N. Y.) 260; *Van Epps v. Harrison* (1843), 5 Hill (N. Y.), 63, 40 Am. Dec. 314 (Bronson, J., dissenting); *Pendergast v. Reed* (1868), 29 Md. 398, 96 Am. Dec. 539; *Teachout v. Van Hoesen* (1888), 76 Iowa, 113, 40 N. W. R. 96, 14 Am. St. R. 206, 1 L. R. A. 664; *Fairchild v. McMahon* (1893), 139 N. Y. 290, 34 N. E. R. 779, 36 Am. St. R. 701; *Townsend v. Felthousen* (1898), 156 N. Y. 618, 51 N. E. R. 279; *McAleer v. Horsey* (1871), 35 Md. 439; *Green v. Bryant* (1847), 2 Ga. 66; *Paetz v. Stoppleman*, 75 Wis. 510.

The following have been held to be representations of fact and therefore actionable. Representations that a business is profitable, *Cruess v. Fessler* (1870), 39 Cal. 336; that a certain income has been realized from the royalty on a patent, *Crosland v. Hall* (1880), 33 N. J. Eq. 111; that a

patent had been sold for a given sum in certain States, *Somers v. Richards* (1873), 46 Vt. 170; that a note sold is "perfectly good," *Crane v. Elder* (1892), 48 Kan. 259, 29 Pac. R. 151, 15 L. R. A. 795; *Bish v. Beatty*, 111 Ind. 403, 12 N. E. R. 523; that a business is profitable and yields a revenue of \$20 per day, *O'Donnell Brewing Co. v. Farrar*, 163 Ill. 471, 45 N. E. R. 283; that a business was earning \$2,500 a year net, *Boles v. Merrill*, 173 Mass. 491, 53 N. E. R. 894; that stock sold was earning a ten per cent. dividend "right along," *Handy v. Waldron*, 19 R. I. 618, 35 Atl. R. 884; that similar property rights had been sold at certain prices, *Potter v. Potter*, 65 Ill. App. 74.

A statement that the price at which the seller offers the goods to the buyer is the same as that at which he has sold to other persons named is of a matter of fact. *Caswell v. Hunton*, 87 Me. 277, 32 Atl. R. 899; *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. R. 108. [In this last case the court said: "Misrepresentations as to the price paid by a third person, or as to the selling price, have heretofore been held actionable or indictable. *Manning v. Albee*, 11 Allen, 520; *Belcher v. Costello*, 122 Mass. 189; *Com. v. Wood*, 142 Mass. 459; *Fairchild v. McMahon*, 139 N. Y. 290. Falsehood as to rents received is similar in principle. *Brown v. Castles*, 11 Cush. 348, 350. False statements as to market value may not be actionable if made to an experienced dealer in the article spoken of. *Lilienthal v. Suffolk Brewing Co.*, 154 Mass.

§ 938. **Representations as to quantity.**—Material misrepresentations concerning the quantity of the thing sold, which were made to be acted upon and have deceived the purchaser, will likewise justify rescission or an action. As has been seen, a party may not ordinarily deal with his eyes shut, nor rely upon representations which are obviously untrue; but where the matter is not thus palpable to the observation, the buyer may rely upon the express and positive representations of the seller as to quantity made to influence the buyer's action, and it is no objection that the buyer might by count or measurement have ascertained that the representation was untrue.¹

§ 939. —. But here, as in the other cases already considered, the representation must have been made as of a matter

185; *Graffenstein v. Epstein*, 23 Kan. 413. But it is otherwise if they are made to an unskilled person. *Dawe v. Morris*, 149 Mass. 188, 191.”]

A statement that a certain person, upon whose judgment the buyer would naturally rely, had offered a certain price for the property is a representation of fact. *Moline Plow Co. v. Carson*, 72 Fed. R. 387, 36 U. S. App. 448, 18 C. C. A. 606. So of representations that the seller had been offered a certain price. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. R. 475. (But *Boles v. Merrill*, 173 Mass. 491, 53 N. E. R. 894; *Cole v. Smith*, 26 Colo. 506, 58 Pac. R. 1086, are *contra*.)

And so of statements as to cost, where the agreement was to sell “at cost as per invoice,” and the seller secretly went through and changed the figures. *Welch v. Burdick*, 101 Iowa, 70, 70 N. W. R. 94. To like effect: *Miller v. Buchanan*, 10 Ind. App. 474, 38 N. E. R. 56.

Compare *Underwood v. Caldwell*, 102 Ga. 16, 29 S. E. R. 164.

¹ Thus, in *Lewis v. Jewell* (1890), 151 Mass. 345, 24 N. E. R. 52, 21 Am.

St. R. 454, it was held that if the owner of carpets covering the halls, stairs and twelve rooms of a house knowingly and falsely represents, as of his own knowledge, the number of yards contained, and the buyer relies upon the representation, the seller is liable for the fraud, even though the buyer might have measured the carpets for himself. The earlier Massachusetts cases of *Gordon v. Parmelee*, 2 Allen, 212; *Noble v. Googins*, 99 Mass. 231, and *Parker v. Moulton*, 114 Mass. 99, 19 Am. R. 315, which deny to the buyer of land, open to observation, the right to rely on the vendor's representations as to quantity, were limited. They are also limited in *Roberts v. French* (1891), 153 Mass. 60, 10 L. R. A. 656, 25 Am. St. R. 611, 26 N. E. R. 416.

As to misrepresentations concerning the number of cattle upon a range, where the difficulty of estimating the number and all of the facts are known to the buyer, see *Cole v. Smith*, 26 Colo. 506, 58 Pac. R. 1086.

of fact, and not be merely the expression of the seller's judgment or opinion as to matters concerning which the buyer may exercise his own judgment as well.¹

§ 940. Remedies of the buyer.—Five remedies are frequently open to the buyer where the contract has been executed, though not always concurrently: 1. He may rescind the contract and recover what he has parted with.² 2. He may, where the article received is of no value, recover the money paid by him as money paid without consideration.³ 3. He may, subject to the limitations laid down by such cases as *Derry v. Peek*, recover damages in an action for the deceit.⁴ 4. He may, where the representation is a term in the contract, or is what is frequently called a fraudulent warranty, ignore the tort and sue as for a breach of warranty.⁵ To these may be added another: 5. He may, in an action brought by the seller for the price, recoup his damages for the injury sustained.⁶ If the contract is executory, he may refuse performance upon the ground of the fraud by which it was procured.

§ 941. — Must restore article.—If the buyer would rescind or recover the consideration paid, he must restore the article or show it to be worthless.⁷ If the seller had no title, return to him need not be made.⁸ The other remedies, based

¹ Thus, where both parties are in a situation to form an independent judgment, an assertion by the seller that the goods were sufficient in quantity to last for a certain time must be regarded as a mere expression of his opinion. *Brockhaus v. Schilling*, 52 Mo. App. 73.

² See *ante*, § 907.

³ *Ante*, § 839; *Ripley v. Case* (1889), 78 Mich. 126, 43 N. W. R. 1097, 18 Am. St. R. 428.

⁴ See *ante*, § 875.

⁵ *Trice v. Cockran* (1852), 8 Gratt. (Va.) 442, 56 Am. Dec. 151.

⁶ *Peden v. Moore* (1831), 1 Stew. & Port. (Ala.) 71, 21 Am. Dec. 649; *Bur-*

ton v. Stewart (1828), 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; *Van Epps v. Harrison* (1843), 5 Hill (N. Y.), 63, 40 Am. Dec. 314, and valuable note.

⁷ See *ante*, § 914; *Perley v. Balch* (1839), 23 Pick. (Mass.) 283, 34 Am. Dec. 56; *Burton v. Stewart*, *supra*; *Mason v. Wheeler*, 2 N. Y. Misc. 523; *Havey v. Petrie*, 100 Mich. 190, 59 N. W. R. 187 (as to whether the buyer is bound to return a diseased horse which it was unlawful to sell, *quære*); *Ford v. Oliphant*, — Tex. Civ. App. —, 32 S. W. R. 437.

⁸ *Bliss v. Clark* (1860), 16 Gray (Mass.), 60.

upon the existence or affirmance of the contract, do not, of course, require a restoration.

§ 942. — **Must act promptly.**—The buyer also, if he would rescind, must act promptly and consistently.¹ If, having knowledge of such fraud as will justify repudiation, he affirms the contract, he cannot afterwards rescind on discovering that there was greater or other fraud than that of which he was at first aware.²

IV.

OF FRAUD UPON CREDITORS.

§ 943. **In general.**—The element of fraud may likewise be introduced into the contract of sale by the fact that the sale is made for the purpose of defeating the claims of the seller's creditors. This is not the place for any extended discussion of the law of fraudulent conveyances, which belongs to the separate treatises upon that subject, but a very brief survey of some of the more important aspects of the field seems desirable, and will be given.

§ 944. **The statutory provisions.**—The current rules of law respecting conveyances in fraud of creditors are commonly supposed to find their origin in the statute of 13th Elizabeth, chapter 5, by which all conveyances by debtors made, not

¹ See *ante*, § 908. Buyer must rescind within a reasonable time: (three months too long) *Houston v. Cook*, 153 Pa. St. 43, 25 Atl. R. 622; (four and one-half months too long) *Gamble v. Tripp*, 99 Cal. 223, 33 Pac. R. 851; (two months held not too long) *Boles v. Merrill* (1899), 173 Mass. 491, 53 N. E. R. 894, 73 Am. St. R. 308. See also *Wilder v. Beede*, 119 Cal. 646, 51 Pac. R. 1083; *Snyder v. Hegan*, — Ky. App. —, 40 S. W. R. 693; *Humbert v. Larson*, 99 Iowa, 275, 68 N. W. R. 703; *Weich v. Burdick*, 101 Iowa, 70, 70 N. W. R.

94; *Hansen v. Baltimore, etc. Co.*, 86 Fed. R. 832; *Smith v. Estey Organ Co.*, 100 Ga. 628, 28 S. E. R. 392; *Patent Title Co. v. Stratton*, 89 Fed. R. 174.

Whether he has, by acquiescing in the sale after the discovery of the fraud, elected to treat the property as his own, is a question for the jury. *Fleming v. Hanley*, 21 R. I. 141, 42 Atl. R. 520; *National Bank of Dakota v. Taylor*, 5 S. Dak. 99, 58 N. W. R. 297.

² *Campbell v. Fleming*, 1 Ad. & E. 40.

bona fide and for value, but with the intent to hinder, delay or defraud their creditors, were declared to be void as against such creditors and them only. The later statute of 27th Elizabeth, chapter 4, extended protection to subsequent purchasers of lands. These statutes, although probably forming part of the common law in the original States, have inspired legislation in every State of the Union which not only incorporated the form or substance of the English statutes, but has also in many cases gone farther and expressly declared what the English acts asserted by construction only. The most important of these additions is that which has been made in many States, declaratory of the intent,—that sales of goods made by a vendor having them in his possession or control, and assignments of such goods by way of security or upon condition, shall be presumed to be fraudulent as against creditors or subsequent purchasers in good faith, unless accompanied by immediate delivery and followed by an actual and continued change of possession.

§ 945. — **Declaratory of common-law rule.**— In relation to these statutes of Elizabeth, it is to be noticed that, notwithstanding some expressions to the contrary, the acts were simply declaratory of the common law, which, without the statutes, in the language of Lord Mansfield, “would have attained every end proposed by them.”¹

§ 946. — **Transactions voidable, not void.**— Again, though the language of the statutes is that the conveyance shall be *void*, it is clear that in the ordinary case it is no more than *voidable*,² at the option and by the action of the defrauded party, because, as will be seen, until he moves the transaction

¹In *Cadogan v. Kennett* (1776), 2 Cowp. 432. To same effect (per Kent, Ch.): *Sands v. Codwise* (1808), 4 Johns. (N. Y.) 596, 4 Am. Dec. 313; *Farr v. Sims* (1832), Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396; *Hudnal v. Wilder* (1827), 4 McCord (S. C.), 294, 17 Am. Dec. 744; *Beckwith v. Burrough* (1884), 14 R. I. 366, 51 Am. R. 392.

²“Void” in these statutes is, to carry their spirit into effect, to be construed as “voidable.” *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235; *Kearney v. Vaughan*, 50 Mo. 284; *Rappleye v. International Bank*, 93 Ill. 396; *Lyon v. Robbins*, 46 Ill. 276. But see *Mason v. Vestal*, 88 Cal. 396, 22 Am. St. R. 310, 26 Pac. R. 213.

stands,¹ and a *bona fide* purchaser from the transferee acquires a perfect title.² Neither is the transaction necessarily void *in toto*, but only to the extent to which the defrauded party may see fit to attack it.³

§ 947. Sales to defeat creditors usually valid between the parties.—These statutes being thus designed for the protection of creditors only, and operating to render the sale voidable at their election and not absolutely void for all purposes, it follows that such sales, when executed, are entirely operative as between the parties themselves and their personal representatives, and neither party will be permitted to escape from the consequences of the contract by the fact that one or both of them intended to thereby defeat the seller's creditors.⁴ Where, however, they remain wholly or in part executory, the rule is not so clear. Many of the cases treat even the executory contract as valid and enforceable between the parties, permitting, for example, the enforcement of a promissory note given for the purchase price or the direct collection of the purchase price itself.⁵ Other cases treat the executory contract as invalid, and,

¹ See *post*, § 947.

² See *ante*, § 150.

³ *Kearney v. Vaughan, supra*.

⁴ *Hendricks v. Mount* (1820), 2 South. (N. J.) 738, 8 Am. Dec. 623; *Burgett v. Burgett* (1824), 1 Ohio, 469, 13 Am. Dec. 634; *Mackie v. Cairns* (1825), 5 Cow. (N. Y.) 547, 15 Am. Dec. 477; *Hudnal v. Wilder* (1827), 4 McCord (S. C.), 294, 17 Am. Dec. 744; *McGee v. Campbell* (1838), 7 Watts (Pa.), 545, 32 Am. Dec. 783; *Nichols v. Patten* (1841), 18 Me. 231, 36 Am. Dec. 713; *Britt v. Aylett* (1850), 11 Ark. 475, 52 Am. Dec. 282; *Jackson v. Cleveland* (1866), 15 Mich. 94, 90 Am. Dec. 266; *Lawton v. Gordon* (1867), 34 Cal. 36, 91 Am. Dec. 670; *Springer v. Drosch* (1870), 32 Ind. 486, 2 Am. R. 356; *Gilbert v. Stockman* (1892), 81 Wis. 602, 29 Am. St. R. 922,

51 N. W. R. 1076, 52 N. W. R. 1045; *Gross v. Gross*, 94 Wis. 14, 68 N. W. R. 469; *Weatherbee v. Cockrell*, 44 Kan. 380, 24 Pac. R. 417; *Herndon v. Reed*, 82 Tex. 647, 18 S. W. R. 665; *Stephens v. Adair*, 82 Tex. 214, 18 S. W. R. 102.

⁵ *Gary v. Jacobson* (1877), 55 Miss. 204, 30 Am. R. 514 [citing and approving *Dyer v. Homer*, 22 Pick. 253; *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370; *Telford v. Adams*, 6 Watts, 429; *Harvey v. Varney*, 98 Mass. 118; *Nichols v. Patten*, 18 Me. 231, 36 Am. Dec. 713; *Moore v. Thompson*, 6 Mo. 353; *Findley v. Cooley*, 1 Blackf. 262; *Springer v. Drosch*, 32 Ind. 486, 2 Am. R. 356]; *Clemens v. Clemens* (1871), 28 Wis. 637, 9 Am. R. 520. At least if the plaintiff can make out his *prima facie* case with-

by refusing aid to either party, leave the parties in the situation in which they have placed themselves.¹ In other words, "the law will not aid either of the persons committing or attempting the fraud, but will leave them where they have put themselves, without relief. If the contract is executory, it will not be enforced; and if executed, it will not be relieved against. If it has been performed in part, the law gives it effect in so far as it is executed, and holds it void in so far as it remains unexecuted."² The weight of authority is with the latter view.

§ 948. — This rule, however, does not, it is said, operate to prevent a party, who has transferred his property with fraudulent intent, from repenting of his fraud and recovering his property from his transferee to whom he has given notice of his change of purpose.³ Neither does it apply where there were really no creditors to defeat, but only a pretended claim fraudulently set up by the transferee for the very purpose of

out being obliged to show the fraud. *Evans v. Dravo* (1854), 24 Pa. St. 62, 62 Am. Dec. 359; *Swan v. Scott*, 11 Serg. & R. (Pa.) 155; *Carpenter v. McClure* (1866), 39 Vt. 9, 91 Am. Dec. 370; *Davis v. Mitchell*, 34 Cal. 81.

¹ *Norris v. Norris* (1840), 9 Dana (Ky.), 317, 35 Am. Dec. 138; *Powell v. Inman* (1862), 8 Jones L. (N. C.) 436, 82 Am. Dec. 426. [The note cites the following cases as to the same effect: *Ager v. Duncan*, 50 Cal. 325; *White v. Crew*, 16 Ga. 416; *Miller v. Marckle*, 21 Ill. 152; *Ryan v. Ryan*, 97 Ill. 38; *Welby v. Armstrong*, 21 Ind. 489; *Brookover v. Hurst*, 1 Met. (Ky.) 665; *Walton v. Tusten*, 49 Miss. 569; *Hamilton v. Scull*, 25 Mo. 165, 69 Am. Dec. 460; *Fenton v. Ham*, 35 Mo. 409; *Harwood v. Knapper*, 50 Mo. 456; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. R. 781; *Demeritt v. Miles*, 22 N. H. 523; *Eyre v. Eyre*, 19 N. J. Eq. 42; *Church v. Muir*, 33 N. J. L. 318;

Nellis v. Clark, 20 Wend. 24; s. c., 4 Hill, 424; *Johnson v. Morley*, Hill & Den. 29; *Niver v. Best*, 10 Barb. 369; *Westfall v. Jones*, 23 Barb. 9; *Briggs v. Merrill*, 58 Barb. 389; *Goudy v. Gebhart*, 1 Ohio St. 262; *Bradford v. Beyer*, 17 Ohio St. 388; *Harvin v. Weeks*, 11 Rich. L. 601; *Harrison v. Bailey*, 14 S. C. 334; *Walker v. McConnico*, 10 Yerg. 228; *Willis v. Morris*, 63 Tex. 458, 51 Am. R. 655; *Jones v. Comer*, 5 Leigh, 350; *Heath v. Van Cott*, 9 Wis. 516.] *Heineman v. Newman* (1875), 55 Ga. 262, 21 Am. R. 279; *Springfield, etc. Ass'n v. Roll* (1891), 137 Ill. 205, 27 N. E. R. 184, 31 Am. St. R. 358; *Williams v. Clink* (1892), 90 Mich. 297, 51 N. W. R. 453, 30 Am. St. R. 443; *Davis v. Sittig*, 65 Tex. 497.

² Per *Morse, C. J.*, in *Williams v. Clink*, *supra*.

³ *Carll v. Emery* (1888), 115 Mass. 32, 12 Am. St. R. 515, 1 L. R. A. 618, 18 N. E. R. 574.

securing a conveyance to himself;¹ nor it seems where the transferee by fraudulent practices has secured the conveyance to himself of additional property which the transferrer did not intend to include.²

§ 949. Basis and extent of creditor's right to interfere with sales.—The whole body of the law upon the subject now in hand is based upon the theory that certain, at least, of a debtor's property may be made available by his creditors for the satisfaction of their claims, and that persons, in becoming his creditors, have to some extent relied upon his real or apparent ownership of property which could be made to respond to the demands thereby created. What these statutes aim to prevent, therefore, is the fraudulent disappointment of this expectation — the disposition by the debtor of his property, not *bona fide* and for value, but with the intent to hinder, delay or defraud his creditors in their endeavors to apply it to their demands.

§ 950. —. A disposition, consequently, not made with this intent, or not having this effect, or one made *bona fide* and for value, presents no such objection; and if the disposition be of property to which the creditors could make no claim, the purpose or effect of its disposition must be a matter with which the creditors are not concerned. The debtor's dealings with his exempt property can therefore not be in fraud of creditors;³

¹ In such a case, it is said, the parties are *in delicto* but not *in pari delicto*. Harper v. Harper (1887), 85 Ky. 160, 8 S. W. R. 5, 7 Am. St. R. 588; Boyd v. De la Montagnie (1878), 73 N. Y. 498, 29 Am. R. 197; Nichols v. McCarthy (1885), 53 Conn. 299, 23 Atl. R. 93, 55 Am. R. 105; Kleeman v. Peltzer (1885), 17 Neb. 331, 22 N. W. R. 793; Holliway v. Holliway (1883), 77 Mo. 392; Barnes v. Brown (1875), 32 Mich. 146.

² Clemens v. Clemens (1871), 28 Wis. 637, 9 Am. R. 520.

³ The transfer of property which is exempt from execution cannot be fraudulent as against creditors. Union Pac. Ry. Co. v. Smersh (1888), 22 Neb. 751, 36 N. W. R. 139, 3 Am. St. R. 290; Blair v. Smith (1887), 114 Ind. 114, 15 N. E. R. 817, 5 Am. St. R. 593; Nance v. Nance (1887), 84 Ala. 375, 4 S. R. 699, 5 Am. St. R. 378; Freehling v. Bresnahan (1886), 61 Mich. 540, 28 N. W. R. 531, 1 Am. St. R. 617; Elliot v. Hall (1892), 2 Idaho, 1142, 31 Pac. R. 796, 35 Am. St. R. 285, 18 L. R. A. 586; Pipkin v. Will-

and, as to that not exempt, creditors can have reason to complain only when the intention and effect are to embarrass or defeat them.¹ The subjects for the present investigation become, then, 1. What dispositions are contemplated; 2. How shall the intent be determined; and 3. Who are the creditors who can complain of them.

§ 951. What dispositions are obnoxious to the statutes.—

The means by which the debtor so disposes of his property as to hinder, delay or defraud his creditors is immaterial. The methods of fraud are infinite; its results are uniform. Secret conveyances, transfers in trust, judgments fraudulently confessed, fictitious considerations, are but a few of the more common devices; those with which the present investigation is concerned are such only as take on the semblance of a sale of chattels. And of these it is necessary here to take cognizance only of those which are the result of the voluntary act of the seller; for it is said, though as to this the authorities are not entirely agreed, that the rules and statutes now under consideration do not apply to forced sales, as, for example, those made upon execution.² So where the sale is a public one, made, for example, in execution of a deed of trust, "the pub-

iams (1893), 57 Ark. 242, 21 S. W. R. 433, 38 Am. St. R. 241; Sannoner v. King (1887), 49 Ark. 299, 5 S. W. R. 327, 4 Am. St. R. 49; Derby v. Weyrich (1879), 8 Neb. 174, 30 Am. R. 827; Carhart v. Harshaw (1878), 45 Wis. 340, 30 Am. R. 752; Pearson v. Quist, 79 Iowa, 54, 44 N. W. R. 217.

Contra: Folsom v. Carli (1861), 5 Minn. 333, 80 Am. Dec. 429.

¹If the debtor retains or subsequently acquires ample property to satisfy present creditors, and has no intention to defeat future ones, an open conveyance of a part of his property will not be fraud. Brumbaugh v. Richcreek, 127 Ind. 240, 26 N. E. R. 664, 22 Am. St. R. 649; Usher v. Hazeltine, 5 Greenl. (Me.) 471, 17

Am. Dec. 253; Miles v. Richards, Walk. (Miss.) 477, 12 Am. Dec. 584; Brock v. Rich, 76 Mich. 644, 43 N. W. R. 580; Wilbur v. Nichols, 61 Vt. 432, 18 Atl. R. 154.

But there must be actually, and not merely nominally, enough. Marmion v. Harwood, 124 Ill. 104, 7 Am. St. R. 345, 16 N. E. R. 236.

²See Huebler v. Smith (1892), 63 Conn. 186, 25 Atl. R. 658, 36 Am. St. R. 337; Lilienthal v. Ballou, 125 Cal. 183, 55 Pac. R. 251; Smith v. Crisman (1879), 91 Pa. St. 428.

Contra: Stimson v. Wrigley (1881), 86 N. Y. 332; Kuykendall v. McDonald (1853), 15 Mo. 416, 57 Am. Dec. 212.

licity of such sale dispenses with the necessity of an actual delivery of the possession."¹

§ 952. Bona fide conveyances for value cannot be impeached.—As has been seen,² the original statutes (speaking not yet of the statutes relating to retention of possession) exempt from their operation sales made to one who purchases in good faith and for a valuable consideration, even though the seller intended thereby to defraud his creditors. But to entitle such a purchaser to protection both elements must be present: *i. e.*, he must purchase not only in good faith but also for a valuable consideration.³ And where the consideration remains unpaid, in whole or in part, at the time of the sale, the purchaser can be protected only to the extent to which he has subsequently paid it before receiving notice of the fraud.⁴ Three things, therefore, are necessary, and if present will suf-

¹Clark v. Cox (1893), 118 Mo. 652, 24 S. W. R. 221.

²See *ante*, § 944.

³Neither good faith nor valuable consideration will alone suffice; both must concur. Davis v. Schwartz (1894), 155 U. S. 631; Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. R. 405, 15 Am. St. R. 692; Tuteur v. Chase, 66 Miss. 476, 6 S. R. 241, 4 L. R. A. 832, 14 Am. St. R. 577; Bull v. Bray, 87 Cal. 286, 26 Pac. R. 873, 13 L. R. A. 576; Lyons v. Leahy, 15 Oreg. 8, 13 Pac. R. 643, 3 Am. St. R. 133; Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277; Worland v. Kimberlin, 6 B. Mon. (Ky.) 608, 44 Am. Dec. 785; Shelley v. Boothe, 73 Mo. 74, 39 Am. R. 481; Wood v. Chambers, 20 Tex. 217, 70 Am. Dec. 392; Beidler v. Crane, 135 Ill. 92, 25 N. E. R. 655, 25 Am. St. R. 349; Rogers v. Evans, 3 Ind. 571, 56 Am. Dec. 537.

⁴Purchaser will be protected only to extent of payments before notice. Tillman v. Heller (1890), 78

Tex. 597, 14 S. W. R. 700, 22 Am. St. R. 77, 11 L. R. A. 628 (citing to same point, Dougherty v. Cooper, 77 Mo. 528; Arnholt v. Hartwig, 73 Mo. 485; Dixon v. Hill, 5 Mich. 404; Bush v. Collins, 35 Kan. 535, 11 Pac. R. 425); Beidler v. Crane (1890), 135 Ill. 92, 25 N. E. R. 655, 25 Am. St. R. 349 (citing Phelps v. Curts, 80 Ill. 109; Lobstein v. Lehn, 120 Ill. 549, 12 N. E. R. 68); Arnholt v. Hartwig, 73 Mo. 485; Schloss v. Feltus, 96 Mich. 619, 55 N. W. R. 1010; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. R. 928.

Purchaser who pays part in cash and gives his note for the balance can be protected as to the balance represented by such note only when the note is negotiable, and he must show that it was so. Tillman v. Heller, *supra*. Negotiable note may be regarded as payment (Beurman v. Van Buren, 44 Mich. 496, 7 N. W. R. 67), but not a non-negotiable one. Dixon v. Hill, 5 Mich. 404.

fiar, to sustain the purchase as against the seller's creditors: 1. The purchaser must purchase in good faith. 2. There must be a valuable consideration; and 3. That consideration must actually have been paid without notice of the seller's fraud.¹

§ 953. — **Fraud of seller alone not enough.**— The seller's fraud alone is not therefore of itself enough to defeat the title of the purchaser for value. To accomplish that result, the purchaser must, to some extent at least, have known of or participated in the intention of the seller. How direct and full the purchaser's knowledge must be is a question upon which the authorities do not agree. The court in Massachusetts has required not only knowledge of the seller's fraud, but participation in it.² In New York,³ Connecticut,⁴ Missouri,⁵ Oregon,⁶ and perhaps other States,⁷ actual knowledge by the buyer must

¹ *Tillman v. Heller*, 78 Tex. 597, 14 S. W. R. 700, 11 L. R. A. 628, 22 Am. St. R. 77; *Galbreath v. Cook*, 30 Ark. 417; *Smith v. Selz*, 114 Ind. 229, 16 N. E. R. 524; *Arnholz v. Hartwig*, 73 Mo. 485; *Stone v. Spencer*, 77 Mo. 356; *Paul v. Baugh*, 85 Va. 955, 9 S. E. R. 329; *Beasley v. Bray*, 98 N. C. 266, 3 S. E. R. 497; *Hedman v. Anderson*, 6 Neb. 392; *Beidler v. Crane*, 135 Ill. 92, 25 Am. St. R. 349, 25 N. E. R. 655.

"The consideration must, in all cases, be actually passed before notice. Unless payment has been actually made in some shape, the authorities are quite clear that the purchase will not be upheld." *Dixon v. Hill*, 5 Mich. 404. Same: *Arnholz v. Hartwig*, 73 Mo. 485.

² *Foster v. Hall* (1831), 12 Pick. 89, 22 Am. Dec. 400; *Ricker v. Ham*, 14 Mass. 137; *Hill v. Ahern*, 135 Mass. 158; *Bristol Savings Bank v. Keavy*, 128 Mass. 298.

Participation seems also to be required in Kentucky. *Brown v. Foree* (1847), 7 B. Mon. 357, 46 Am. Dec. 519.

³ *Parker v. Conner* (1883), 93 N. Y.

118, 45 Am. R. 178; *Stearns v. Gage*, 79 N. Y. 102; *Bush v. Roberts* (1888), 111 N. Y. 278, 7 Am. St. R. 741, 18 N. E. R. 732.

⁴ *Knower v. Cadden Clothing Co.* (1889), 57 Conn. 202, 17 Atl. R. 580.

⁵ "The knowledge of facts which, if investigated and followed out, would lead to knowledge of the fraud, is not deemed sufficient under the decisions of this court." *State v. Mason* (1892), 112 Mo. 374, 20 S. W. R. 629, 34 Am. St. R. 390; *Van Raalte v. Harrington* (1890), 101 Mo. 602, 20 Am. St. R. 626, 11 L. R. A. 424, 14 S. W. R. 710. Compare *Connecticut Mut. L. Ins. Co. v. Smith* (1893), 117 Mo. 261, 38 Am. St. R. 656, 22 S. W. R. 623. See also *Riley v. Vaughan*, 116 Mo. 169, 22 S. W. R. 707.

⁶ *Lyons v. Leahy* (1887), 15 Oreg. 8, 13 Pac. R. 643, 3 Am. St. R. 133; *Coolidge v. Heneky*, 11 Oreg. 327, 8 Pac. R. 281.

⁷ The same rule prevails in New Hampshire. *Seavy v. Dearborn* (1849), 19 N. H. 351.

be shown. The majority of the courts, however, do not go so far,¹ and the rule sustained by the great weight of the authorities is that neither participation nor actual knowledge is required, but that notice of facts sufficient to put a prudent man

¹In **Michigan** it is held "that knowledge of facts sufficient to put an ordinarily prudent man on inquiry is all that is required, and that participation in the fraud is not necessary." *Bedford v. Penny*, 58 Mich. 424, 25 N. W. R. 381; *Hough v. Dickinson*, 58 Mich. 89, 24 N. W. R. 809; *Eureka Iron Works v. Bresnahan*, 66 Mich. 489, 33 N. W. R. 834. See also *Treusch v. Ottenburg*, 4 C. C. A. 629, 54 Fed. R. 867.

In **Texas**, "knowledge of facts sufficient to excite the suspicions of a prudent man and to put him upon inquiry is sufficient." *Moseby v. Gainer*, 10 Tex. 393; *Edrington v. Rogers*, 15 id. 188; *Mills v. Howeth*, 19 Tex. 257, 70 Am. Dec. 331.

In **Mississippi**, knowledge, "or, what is the same thing, notice of such facts or circumstances as would lead a reasonable man to the conclusion that fraud in fact existed or was intended." *Tuteur v. Chase* (1889), 66 Miss. 476, 6 S. R. 241, 14 Am. St. R. 577, 4 L. R. A. 832.

In **New Jersey**, "circumstances . . . of such a character as to awaken his suspicion and put him upon inquiry" will charge a mortgagee with knowledge. *Moore v. Williamson* (1888), 44 N. J. Eq. 496, 15 Atl. R. 587, 1 L. R. A. 336; *De Witt v. Van Sickle*, 29 N. J. Eq. 209.

In **Alabama**, knowledge, or notice of such facts as would put a reasonable man upon inquiry, is sufficient. *Smith v. Collins* (1891), 94 Ala. 394, 10 S. R. 334; *Stix v. Keith* (1888), 85 Ala. 465, 5 S. R. 184.

The same rule prevails in **Iowa**: *Williamson v. Wachenheim* (1882), 58 Iowa, 277, 12 N. W. R. 302; *Jones v. Hetherington* (1877), 45 Iowa, 681; *Lyons v. Hamilton*, 69 Iowa, 47, 28 N. W. R. 429; *Spaulding v. Adams*, 63 Iowa, 437, 19 N. W. R. 341.

In **Nebraska**: *Bollman v. Lucas* (1888), 22 Neb. 796, 36 N. W. R. 465; *Temple v. Smith* (1882), 13 Neb. 513, 14 N. W. R. 527. See also *Brittain v. Crowthers*, 4 C. C. A. 341, 54 Fed. R. 295.

In **Kansas**: *Gollob v. Martin* (1885), 33 Kan. 252, 6 Pac. R. 267.

In **Minnesota**: *Holcombe v. Ehrmanntraut* (1891), 46 Minn. 397, 49 N. W. R. 191; *Manwaring v. O'Brien*, 75 Minn. 542, 78 N. W. R. 1.

In **Maryland**: *Biddinger v. Wiland* (1887), 67 Md. 359, 10 Atl. R. 202; *Higgins v. Lodge* (1887), 68 Md. 229, 6 Am. St. R. 437, 11 Atl. R. 846.

In **California**: *Godfrey v. Miller* (1889), 80 Cal. 420, 22 Pac. R. 290.

In **Wisconsin**: *Hooser v. Hunt* (1886), 65 Wis. 71, 26 N. W. R. 442.

In **Nevada**: *Greenwell v. Nash* (1878), 13 Nev. 286.

In **Arkansas**: *Dyer v. Taylor* (1887), 50 Ark. 314, 7 S. W. R. 258.

In **Virginia**: *Hickman v. Trout*, 83 Va. 478, 3 S. E. R. 131; *Batchelder v. White*, 80 Va. 103.

In **Georgia**: *Smith v. Wellborn*, 75 Ga. 799; *Phillips v. Adair*, 59 Ga. 370.

In **Indiana**: *Sanders v. Muegge* (1883), 91 Ind. 214.

In **Illinois**: *Mathison v. Prescott* (1877), 86 Ill. 493.

upon an inquiry which would have disclosed the truth will prevent the purchaser from becoming a *bona fide* purchaser within the statute.¹

§ 954. — **Inadequacy of consideration.**— “Adequacy” of consideration is not usually indispensable to make it “valuable,” and this rule is applicable here; but at the same time it is unquestionable that an inadequate consideration may raise a presumption of bad faith on the part of the buyer, which will grow in conclusiveness as the inadequacy appears more and more gross.²

In **Pennsylvania**: *Dean v. Connelly* (1847), 6 Barr, 239.

In **South Dakota**: *Shauer v. Alterton*, 151 U. S. 607.

In **England**, the same rule is applied under the statute. *National Bank v. Morris*, [1892] 17 App. Cas. 287.

¹The existence of the facts and their sufficiency to constitute notice or knowledge are usually questions to be determined by the jury, and a wide range of evidence is ordinarily admissible. *Lyons v. Leahy*, 15 Oreg. 8, 13 Pac. R. 643, 3 Am. St. R. 133; *Hough v. Dickinson*, 58 Mich. 89, 24 N. W. R. 809; *Tuteur v. Chase*, 66 Miss. 476, 6 S. R. 241, 14 Am. St. R. 577, 4 L. R. A. 832; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. R. 286; *Helms v. Green*, 105 N. C. 251, 11 S. E. R. 470, 18 Am. St. R. 893; *Heaton v. Nelson*, 74 Mich. 199, 41 N. W. R. 895; *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. R. 153; *Van Raalte v. Harrington*, 101 Mo. 602, 14 S. W. R. 710, 20 Am. St. R. 626, 11 L. R. A. 424; *State v. Mason*, 112 Mo. 374, 20 S. W. R. 629; *Boyle v. Maroney*, 73 Iowa, 70, 35 N. W. R. 145, 5 Am. St. R. 657.

²In **Alabama** it is said that “while ‘the law will not weigh considerations in diamond scales,’ nor so closely bal-

ance the property against the price as to leave no room for the ordinary differences of opinion as to values, yet when the jury can see that the disparity amounts to a gross inadequacy their verdict should be against the transaction.” *Mobile Sav. Bank v. McDonnell* (1889), 89 Ala. 434, 8 S. R. 137, 18 Am. St. R. 137, 9 L. R. A. 645. The question here is different from the case in which the *grantor* seeks to set aside a conveyance for inadequacy. Here “inadequacy of price, when unreasonable, is evidence of a secret trust, and it is *prima facie* evidence that a conveyance is not *bona fide*, if it is accompanied with any trust.” *Kuykendall v. McDonald* (1852), 15 Mo. 416, 57 Am. Dec. 212. “There is no doubt that inadequacy of price in the sale of property by an insolvent debtor is a badge of fraud; but it is not regarded as sufficient alone to raise a legal inference of fraud, unless so grossly so as to ‘strike the understanding at once with the conviction that such a sale never could have been made in good faith.’” *State v. Mason*, 112 Mo. 374, 20 S. W. R. 629, 34 Am. St. R. 390. The inadequacy was held to be so strikingly great in *Connecticut Mut. L.*

§ 955. — **Considerations other than pecuniary.**— The consideration need not be a pecuniary one. It may be anything which the law in other cases regards as valuable.¹ Satisfaction or security of a debt owing by the seller to the buyer will suffice, and the latter may thus lawfully secure a *bona fide*

Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. R. 656, 22 S. W. R. 623.

The price paid may be so entirely inadequate as to put a prudent man on his guard. Weber v. Rothchild (1887), 15 Oreg. 385, 15 Pac. R. 650, 8 Am. St. R. 162.

And while mere inadequacy may not prove fraud, it is clear that if gross it may do so, and in any event it is a proper matter for consideration by the jury. Kempner v. Churchill, 8 Wall. (U. S.) 362; Jaeger v. Kelley, 52 N. Y. 274; Emonds v. Termehr, 60 Iowa, 92, 14 N. W. R. 197; Shelton v. Church, 38 Conn. 416; McFadden v. Mitchell, 54 Cal. 628; Newman v. Kirk, 45 N. J. Eq. 677, 18 Atl. R. 224; Smith v. Boyer, 29 Neb. 76, 45 N. W. R. 265, 26 Am. St. R. 373; Philbrick v. O'Connor. 15 Oreg. 15, 3 Am. St. R. 139, 13 Pac. R. 612; Weber v. Rothchild, 15 Oreg. 385, 15 Pac. R. 650, 3 Am. St. R. 162.

¹ Thus a conveyance in consideration of marriage is a valuable one, which will sustain it as against creditors (marriage portion to grantor's daughter). Cohen v. Knox (1891), 90 Cal. 266, 27 Pac. R. 215, 13 L. R. A. 711 [citing Magniac v. Thompson, 32 U. S. (7 Pet.) 348, 8 L. ed. 709; Prewitt v. Wilson, 103 U. S. 22, 26 L. ed. 360; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Herring v. Wickham, 29 Gratt. (Va.) 628, 26 Am. R. 405; Huston v. Cantril, 11 Leigh (Va.), 136; Sterry v. Arden, 1 Johns. (N. Y.) Ch. 261; Brown v. Carter, 5 Ves. Jr. 862; Otis v. Spencer, 102 Ill.

622, 40 Am. R. 617; Dugan v. Gittings, 3 Gill (Md.), 138, 43 Am. Dec. 306]; National Exch. Bank v. Watson, 13 R. I. 91, 40 Am. R. 623, n.

Consideration of future support of grantor is not one which will sustain the consequence as against creditors, at least unless he retains sufficient property to pay his present debts. Johnston v. Harvy, 2 Pen. & W. (Pa.) 82, 21 Am. Dec. 426; Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Woodall v. Kelly, 85 Ala. 368, 5 S. R. 164, 7 Am. St. R. 57; Harting v. Jockers, 136 Ill. 627, 27 N. E. R. 188, 29 Am. St. R. 341; Davidson v. Burke, 143 Ill. 139, 32 N. E. R. 514, 36 Am. St. R. 367.

Conveyance by insolvent father to son in consideration of wages of son earned while unemancipated, and received by father, is not valid as against father's creditors. Halliday v. Miller, 29 W. Va. 424, 6 Am. St. R. 653.

But a conveyance of land made in pursuance of a parol trust — a promise to the deviser through whose will it was received — was upheld against creditors in Carver v. Todd, 48 N. J. Eq. 102, 21 Atl. R. 943, 27 Am. St. R. 466; and so was a conveyance made to perfect a parol gift, made by a father then solvent but now insolvent, to a son who had made permanent improvements. Dozier v. Matson, 94 Mo. 328, 7 S. W. R. 268, 4 Am. St. R. 388; Willis v. McIntyre, 70 Tex. 34, 8 Am. St. R. 574, 7 S. W. R. 594.

debt even though the process exhausts the seller's property, leaving nothing for his other creditors.¹

§ 956. Conveyance subject to secret lien or trust.—Lacking in the essential elements which alone sustain the convey-

¹ **The transfer by a debtor of property, at a fair valuation, in payment of an honest debt** is, in the absence of a statute making it so, no fraud upon other creditors, even though the debtor is insolvent and such conveyance will prevent other creditors from getting their pay, as both grantor and grantee knew or must have known. *Covanhovan v. Hart* (1853), 21 Pa. St. 495, 60 Am. Dec. 57 [Sumner's Appeal, 16 Pa. St. 169, and *Ashmead v. Hean*, 13 id. 584, being overruled]; *Crawford v. Kirksey* (1876), 55 Ala. 282, 28 Am. R. 704; *Roswald v. Hobbie* (1887), 85 Ala. 73, 4 S. R. 177, 7 Am. St. R. 23; *Bamberger v. Schoolfield* (Ala.), 160 U. S. 149, 16 S. Ct. R. 225, 40 L. ed. 374; *Pollock v. Meyer* (1892), 96 Ala. 172, 11 S. R. 385; *Dawson v. Flash* (1893), 97 Ala. 539, 12 S. R. 67; *Powell v. Kelly* (1888), 82 Ga. 1, 3 L. R. A. 139, 9 S. E. R. 278; *Citizens' Bank v. Williams* (1891), 128 N. Y. 77, 28 N. E. R. 33, 26 Am. St. R. 454; *Shelley v. Boothe* (1880), 73 Mo. 74, 39 Am. R. 481; *Christian v. Greenwood* (1861), 23 Ark. 258, 79 Am. Dec. 104; *York County Bank v. Carter* (1861), 38 Pa. St. 446, 80 Am. Dec. 494; *Hauser v. Beaty* (1892), 93 Mich. 499, 53 N. W. R. 628; *Erdall v. Atwood*, 79 Wis. 1; *Weaver v. Nugent*, 73 Tex. 273, 10 S. W. R. 458, 13 Am. St. R. 792; *Elwood v. May*, 24 Neb. 375, 38 N. W. R. 793; *Smith v. Boyer*, 29 Neb. 76, 45 N. W. R. 265, 26 Am. St. R. 373; *Bailey v. Kennedy*, 2 Del. Ch. 12, 29 Am. Dec. 351; *Schram v. Taylor*, 51 Kan. 547, 33 Pac. R. 315; *Nelson v.*

Kinney, 93 Tenn. 428, 25 S. W. R. 100; *Matthews v. Reinhardt*, 43 Ill. App. 169.

Principal debtor may transfer property to indemnify a surety who assumes the debt. *Frees v. Baker*, 81 Tex. 216, 13 L. R. A. 340, 16 S. W. R. 900; *Pollock v. Jones*, 96 Ala. 492, 11 S. R. 529.

The same rule applies to a mortgage by a debtor, though insolvent, to secure one debtor for *bona fide* debt, in the absence of a statute forbidding such preferences. *Warner v. Littlefield* (1891), 89 Mich. 329, 50 N. W. R. 721; *Sheldon v. Mann* (1891), 85 Mich. 265, 48 N. W. R. 573; *First National Bank v. Ridenour* (1891), 46 Kan. 718, 27 Pac. R. 150, 26 Am. R. 167; *McFadden v. Ross*, 126 Ind. 341, 26 N. E. R. 78; *Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. R. 256.

And so where there is a conveyance of property in payment of a valid debt, though there is an agreement to reconvey upon payment of that debt. *Carey Lumber Co. v. Cain*, 70 Miss. 628, 13 S. R. 239.

It may be otherwise if the value of the property is greatly in excess of the debt. *Thompson v. Richardson Drug Co.*, 33 Neb. 714, 29 Am. St. R. 505, 50 N. W. R. 948.

Statutes forbidding preferences by insolvent debtors.—It is, of course, competent by statute to forbid certain preferences to be made by insolvent debtors; but this is a subject foreign to the present consideration. But, for example, see

ances considered in the last section, though they may resemble them in form, are conveyances made by a debtor, apparently actual, but really subject to a secret lien, charge or trust in favor of the grantor. Such conveyances cannot avail as against the debtor's creditors.¹ Knowledge or participation by the grantee in the grantor's purpose, though usual, is not indispensable to the invalidity of the transfer.²

§ 957. Voluntary conveyances.—The form of transfer, however, which is most frequently assailed by creditors is that which the law terms a "voluntary conveyance." By the term "voluntary" as here used is not meant such a conveyance only as is without any consideration whatever, but any conveyance which is not supported by an actual, legal consideration bearing some fair proportion to the value of the property transferred.³ The law, of course, in many cases permits a man to dispose of his property for an inadequate consideration, or even without any consideration at all; but he cannot do this at the

Wolf v. McGugin, 37 W. Va. 552, 16 S. E. R. 797; Thompson v. Johnson, 55 Minn. 515, 57 N. W. R. 223.

¹Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Winkley v. Hill, 9 N. H. 31, 31 Am. Dec. 215; McCulloch v. Hutchinson, 7 Watts (Pa.), 434, 32 Am. Dec. 776; Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493; Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517.

²Lyons v. Leahy, 15 Oreg. 8, 3 Am. St. R. 133, 13 Pac. R. 643.

³A voluntary conveyance, in this connection, is one not made for a valuable consideration—a question already discussed in section 952. A conveyance may be deemed voluntary as to creditors when it is upon such a consideration as will sustain it between the parties. If a valuable consideration exists in part only, the conveyance can be treated as valid, if at all, only to that extent, and vol-

untary as to the residue. Thus in Snyder v. Partridge, 138 Ill. 173, 29 N. E. R. 851, 32 Am. St. R. 130, it is said: "Where the consideration paid is small in comparison with the real value of the property, and where the circumstances of the case are extremely unfavorable to the fairness of the transaction, though not sufficient to establish absolute fraud, the conveyance will be regarded as a voluntary one to the extent of the difference between the actual consideration and the real value of the property, and to that extent will be treated as fraudulent and void as to existing creditors. Boyd v. Dunlap, 1 Johns. (N. Y.) Ch. 478; Keeder v. Murphy, 43 Iowa, 413; Worthington v. Bullitt, 6 Md. 172; Strong v. Lawrence, 58 Iowa, 55, 12 N. W. R. 74; Norton v. Norton, 5 Cush. (Mass.) 524; Church v. Chapin, 35 Vt. 223; Robinson v. Stewart, 10 N. Y. 189."

expense of his creditors. He must be just before he is generous. He may therefore give away part of his property if he retains ample for the actual satisfaction of his debts, but he will not be permitted to dispose of his property without some fair consideration if he is insolvent, or if such a disposition will leave him so.¹

§ 958. — **Intention of parties.**— The grantee's intention in such cases is immaterial. As he parts with no consideration of value he is entitled to no protection as against creditors.² Neither is the grantor's actual intention conclusive. If he really intends to defraud, the case of course is clear; but even though his intention was not fraudulent the conveyance must be deemed invalid if its effect is to hinder, delay or defeat creditors.³

§ 959. — **Relations of parties.**— The relations of the parties are material, though not conclusive. The law permits and encourages a man to make fair and reasonable provisions for the support of his wife and family,⁴ and it will doubtless look upon such transactions with a more lenient eye than upon conveyances to a mere stranger; but even as to these more favored transfers it is settled that they can only be sustained if they are reasonable in amount and made at a time when they will not interfere with the claims of existing creditors.⁵

¹ The amount retained must be sufficient to actually satisfy, if prosecuted within a reasonable time, the existing indebtedness of the seller. A mere theoretical or probable sufficiency will not do, nor will the absence of a wrongful motive relieve the case of its constructively fraudulent effect. *Marmon v. Harwood*, 124 Ill. 104, 16 N. E. R. 236, 7 Am. St. R. 345; *Driggs v. Norwood*, 50 Ark. 42, 6 S. W. R. 323, 7 Am. St. R. 78; *Patton v. Casey*, 57 Mo. 118; *Potter v. McDowell*, 31 Mo. 62.

² *Lee v. Figg*, 37 Cal. 328, 99 Am.

Dec. 271; *Marmon v. Harwood*, 124 Ill. 104, 16 N. E. R. 236, 7 Am. St. R. 345; *Lyons v. Leahy*, 15 Oreg. 8, 3 Am. St. R. 133, 13 Pac. R. 643.

³ *Marmon v. Harwood*, *supra*.

⁴ See *Lloyd v. Fulton*, 91 U. S. 479.

⁵ Voluntary conveyance to wife or child is fraudulent as to existing creditors, if made when the donor is in embarrassed financial circumstances, even though he retains estate nominally equal in value to, or more than equal to, his indebtedness, when the property retained proves insufficient to discharge all his lia-

§ 960. Retention of possession by seller as badge of fraud.

The statute of 13th Elizabeth, as has been seen,¹ did not extend to purchasers, nor that of 27th Elizabeth to personal property, "yet," it has been said,² "both are embraced in the spirit of those acts respectively," and it is certain that from the decision in *Twyne's Case*³ (1585) to the present time, sales of personal property made with the intent to hinder, delay or defraud creditors or purchasers have been deemed to be within the forbidden classes. The retention of possession by the seller after an absolute sale was there considered to be one of "the signs and marks of fraud," and so it has continued since, though as to its conclusiveness the courts have not been able to agree. In some of the States,⁴ following the early English⁵ and Fed-

bilities. *Marmon v. Harwood*, 124 Ill. 104, 7 Am. St. R. 345, 16 N. E. R. 236.

¹ See *ante*, § 944.

² In *Fleming v. Townsend* (1849), 6 Ga. 103, 50 Am. Dec. 318.

³ 3 Coke, 80, 1 Smith's Lead. Cas. 1, Adams' Cas. on Sales. 831.

⁴ Thus, in *Pennsylvania* there is no statute and the seller's retention of possession is conclusive evidence of fraud. To avoid such a result the purchaser must take possession of the goods — such possession as is reasonable and possible under the circumstances, in determining which "the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of the trade or business, are all to be considered in deciding the sufficiency of the possession taken by the purchaser." *Stephens v. Gifford* (1890), 137 Pa. St. 219, 20 Atl. R. 542, 21 Am.

St. R. 868, citing *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 346; *Babb v. Celmsen*, 10 Serg. & R. 419, 13 Am. Dec. 684; *Streeper v. Eckart*, 2 Whart. 302, 30 Am. Dec. 258; *Eagle v. Eichelberger*, 6 Watts, 29, 31 Am. Dec. 449; *Young v. McClure*, 2 Watts & S. 147; *Barr v. Reitz*, 53 Pa. St. 256; *Crawford v. Davis*, 99 Pa. St. 576; *Miller v. Browarsky*, 130 Pa. St. 372, 18 Atl. R. 643; *Hugus v. Robinson*, 24 Pa. St. 9; *McMarlan v. English*, 74 Pa. St. 296; *Evans v. Scott*, 89 Pa. St. 136; *McClure v. Forney*, 107 Pa. St. 414; *Renninger v. Spatz*, 128 Pa. St. 524, 18 Atl. R. 405, 15 Am. St. R. 692; *Linton v. Butz*, 7 Pa. St. 89, 47 Am. Dec. 501; *Bond v. Bunting*, 78 Pa. St. 210. See also *Brawn v. Keller*, 43 Pa. St. 104, 82 Am. Dec. 554; *Born v. Shaw*, 29 Pa. St. 288, 72 Am. Dec. 633; *For-syth v. Mathews*, 14 Pa. St. 100, 53 Am. Dec. 522.

In *Illinois*, also, retention of possession is fraud *per se* unless consist-

⁵ For the early English rule, see *Edwards v. Harben*, 2 T. R. 587, 1 Rev. R. 548.

For the later rule: *Martindale v.*

Booth, 3 B. & Ad. 498; *Lindon v. Sharp*, 6 M. & G. 895; *Alton v. Harrison*, L. R. 4 Ch. 622.

eral¹ rule, since abandoned, such retention of possession is regarded as conclusive evidence of fraud, while in most it is but *prima facie* only, and the presumption may be rebutted by evidence to the contrary.²

ent with the deed. Thornton v. Davenport (1836), 1 Scam. 296, 29 Am. Dec. 358; Rhines v. Phelps, 3 Gilm. 455; Thompson v. Yeck, 21 Ill. 73; Dexter v. Parkins, 22 Ill. 143; Rees v. Mitchell, 41 Ill. 368; Lemen v. Robinson, 59 Ill. 115; Ticknor v. McClelland, 84 Ill. 471; Johnson v. Holloway, 82 Ill. 334; Richardson v. Rardin, 88 Ill. 124; Rozier v. Williams, 92 Ill. 187; Hewett v. Griswold, 43 Ill. App. 43; Gillette v. Stoddart, 30 Ill. App. 231.

The same rule in substance prevails in Connecticut. Swift v. Thompson, 9 Conn. 63, 21 Am. Dec. 718; Mills v. Camp, 14 Conn. 219, 36 Am. Dec. 488; Rood v. Welch, 28 Conn. 157; Webster v. Peck, 31 Conn. 495; Capron v. Porter, 43 Conn. 383; Crouch v. Carrier, 16 Conn. 505, 41 Am. Dec. 156.

And in New Hampshire: Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375; Stowe v. Taft, 58 N. H. 445; McDonough v. Prescott, 62 N. H. 600.

And in Vermont: Boardman v. Keeler, 1 Aik. 158, 15 Am. Dec. 670; Fletcher v. Howard, 2 Aik. 115, 16 Am. Dec. 686; Batchelder v. Carter, 2 Vt. 168, 19 Am. Dec. 707; Morris v. Hyde, 8 Vt. 352, 30 Am. Dec. 475; Wheeler v. Selden, 63 Vt. 429, 21 Atl. R. 615, 25 Am. St. R. 771, 12 L. R. A. 600; Caswell v. Jones, 65 Vt. 457, 26 Atl. R. 529, 20 L. R. A. 503, 36 Am. St. R. 879; Weeks v. Prescott, 53 Vt. 57.

In Missouri the same rule prevailed, was changed by statute, and then restored: Rocheblave v. Potter, 1 Mo. 561, 14 Am. Dec. 305; Shepherd

v. Trigg, 7 Mo. 151; Claffin v. Rosenberg, 42 Mo. 439, 97 Am. Dec. 336.

In Kentucky the absolute rule prevails: Hundley v. Webb, 3 J. J. Marsh. 644, 20 Am. Dec. 189; Waller v. Todd, 3 Dana, 503, 28 Am. Dec. 94; Jarvis v. Davis, 14 B. Mon. 424, 61 Am. Dec. 166; Vanmeter v. Estill, 78 Ky. 456. Cf. Hagins v. Combs, 102 Ky. 165, 43 S. W. R. 222.

And in Virginia formerly (Mason v. Bond, 9 Leigh, 181, 33 Am. Dec. 243), but not now: Davis v. Turner, 4 Gratt. 423; Norris v. Lake, 89 Va. 513.

And in California: Fitzgerald v. Gorham, 4 Cal. 289, 60 Am. Dec. 616; Brown v. O'Neal, 95 Cal. 262, 30 Pac. R. 538, 29 Am. St. R. 111; Etchepare v. Aguirre, 91 Cal. 288, 25 Am. St. R. 180, 27 Pac. R. 668; Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. R. 857.

And in Florida: Holliday v. McKinne, 22 Fla. 153.

And in Montana, by statute: Harmon v. Hawkins, 18 Mont. 525.

And in Nevada: Comaita v. Kyle, 19 Nev. 38.

¹For the early rule in United States supreme court, see Hamilton v. Russell, 1 Cranch, 309.

For the later rule: Warner v. Norton, 20 How. 448.

²In New York the other rule was at first adopted, but has been changed and finally set at rest by the statute: Sturtevant v. Ballard, 9 Johns. 337, 6 Am. Dec. 281; Bissell v. Hopkins, 3 Cow. 166; Jennings v. Carter, 2 Wend. 446, 20 Am. Dec. 635; Smith v. Acker, 23 Wend. 653; Cole v.

§ 961. — **Regulated by statute in some States.**—In several of the States, as has been seen,¹ the matter is now

White, 26 Wend. 511; Hanford v. Artcher, 4 Hill, 271; Mitchell v. West, 55 N. Y. 107; Barrow v. Paxton, 5 Johns. 258, 4 Am. Dec. 354; Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348.

In **Maine** it is presumptive only: Clark v. French, 23 Me. 221, 39 Am. Dec. 618; Bartlett v. Blake, 37 Me. 124; Googins v. Gilmore, 47 Me. 9; Fairfield Bridge Co. v. Nye, 60 Me. 372; Shaw v. Wilshire, 65 Me. 485; Reed v. Reed, 70 Me. 504.

And in **Texas**: Linn v. Wright, 18 Tex. 317, 70 Am. Dec. 282; Edwards v. Dickson, 66 Tex. 613, 2 S. W. R. 718.

And in **North Carolina**: Grimsley v. Hooker, 3 Jones Eq. 4, 67 Am. Dec. 227; Phifer v. Erwin, 100 N. C. 59, 6 S. E. R. 672.

And in **Virginia**: Davis v. Turner, 4 Gratt. 422; Norris v. Lake, 89 Va. 513, 16 S. E. R. 663.

And in **West Virginia**: Bindley v. Martin, 28 W. Va. 773.

And in **Massachusetts**: Brooks v. Powers, 15 Mass. 244, 8 Am. Dec. 99; Briggs v. Parkman, 2 Metc. 258, 37 Am. Dec. 89; Ingalls v. Herrick, 108 Mass. 351, 11 Am. R. 360.

And in **Tennessee**: Callen v. Thompson, 3 Yerg. 475, 24 Am. Dec. 587; Richmond v. Crudup, Meigs, 581, 33 Am. Dec. 164; Shaddon v. Knott, 2 Swan, 358, 58 Am. Dec. 63; Carney v. Carney, 7 Baxt. 284; Wiley v. Lashlee, 8 Humph. 716.

And in **Georgia**: Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec. 318.

And in **Kansas**: Phillips v. Reitz, 16 Kan. 396; Adams' Cas. on Sales, 637.

And in **Michigan**: Molitor v. Rob-

inson, 40 Mich. 200; Hopkins v. Bishop, 91 Mich. 328, 51 N. W. R. 902, 30 Am. St. R. 480; Clark v. Lee, 78 Mich. 221, 44 N. W. R. 260.

And in **Rhode Island**: Mead v. Gardiner, 13 R. I. 257.

And in **Alabama**: Crawford v. Kirksey, 55 Ala. 282; Moog v. Benedicks, 49 Ala. 512.

And in **Louisiana**: Guice v. Sanders, 21 La. Ann. 463.

And in **Arkansas**: George v. Norris, 23 Ark. 121; Valley Distilling Co. v. Atkins, 50 Ark. 289, 7 S. W. R. 137.

And in **Indiana**: Rose v. Colter, 76 Ind. 590; Powell v. Stickney, 88 Ind. 310.

And in **Ohio**: Thorne v. First Nat. Bank, 37 Ohio St. 254.

And in **Minnesota**: Molm v. Barton, 27 Minn. 530, 8 N. W. R. 765; Camp v. Thompson, 25 Minn. 175; Benton v. Snyder, 22 Minn. 247; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. R. 222.

And in **Nebraska**: Densmore v. Tomer, 14 Neb. 392, 15 N. W. R. 734; Wake v. Griffin, 9 Neb. 47, 2 N. W. R. 461; First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. R. 568.

And in **Wisconsin**: Norwegian Plow Co. v. Hantorn, 71 Wis. 529, 37 N. W. R. 825; Wheeler v. Konst, 46 Wis. 398, 1 N. W. R. 96; Blakeslee v. Rossman, 43 Wis. 116.

And in **New Jersey**: Miller v. Pancoast, 29 N. J. L. 250.

And in **Delaware**: Hagany v. Herbert, 3 Houst. 628.

And in **Florida**: Briggs v. Weston, 36 Fla. 629, 18 S. R. 852.

And in **Arizona**: Liebes v. Steffy, — Ariz. —, 32 Pac. R. 261.

¹ See *ante*, § 944.

regulated by statutes, which as a rule declare that sales and assignments of goods in the possession of the vendor shall be presumed to be fraudulent and void as against creditors and purchasers, unless accompanied by an "immediate delivery," and "followed by an actual and continued change of possession," and such presumption shall be conclusive,¹ unless, as in some States, it is made to appear that such sale or assignment "was made in good faith and without any intent to defraud such creditors or purchasers."²

§ 962. **What delivery or change of possession necessary.**—It remains next to be considered what delivery or change of possession is necessary in order to prevent the imputation of fraud upon creditors or subsequent purchasers. And first it may be noticed that the statutes which have been enacted for the regulation of the subject do not, in the main, declare other or different rules than those which had been already worked out with substantial unanimity by the courts.³

§ 963. — **"Immediate."**—In respect of the period within which the delivery or change of possession shall occur, reason, statutes and decisions unite in declaring that such delivery shall be speedy. The statute in New York, Michigan and other States requires that the delivery shall be "immediate;" in Missouri, by statute, there must be "delivery in a reasonable time, regard being had to the situation of the property;"⁴

¹ **California**, Civ. Code, § 3440; **Colorado**, Gen. Stats., ch. 43, § 14; **Kentucky**, Stats. 1894, § 1908; **Missouri**, 1899, § 3410; **Nevada**, 1885, § 2633; **Oklahoma**, 1893, § 2663; **Utah**, R. S. 1898, § 2473.

² **Arizona**, R. S. 1887, § 2034; **Indiana**, R. S. 1897, § 6945; **Kansas**, G. S. 1897, ch. 112, § 3; **Michigan**, C. L. 1897, § 9520; **Minnesota**, G. S. 1894, § 4219; **New York**, R. S. 1896, Part II, ch. 7, title 2, § 5; **Oregon**, Ann. L. 1892, ch. 8, title 7, § 776; **Wisconsin**, G. S. 1898, § 2310.

³ In *Norton v. Doolittle*, 32 Conn. 405, the rule is said to be one of policy as well as of evidence, and requires "an actual, visible and continued change of possession." In *Seymour v. O'Keefe*, 44 Conn. 123, the court say it "is firmly established in this State as a rule of law and public policy."

⁴ See *Clafin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336; *Stewart v. Nelson*, 79 Mo. 522; *Mills v. Thompson*, 72 Mo. 367; *Burgert v. Borchert*, 59 Mo. 80.

while in Pennsylvania, where no statute exists, the delivery must be made either at the time of the sale or within a reasonable time after it.¹ All of these provisions, it is believed, mean substantially the same thing, namely, that the delivery shall take place as soon as it reasonably may, regard being had, not to the convenience of the parties, but to the character of the goods, the situation of the property and the circumstances of the case.² It will, by the weight of authority, suffice if it occur before the rights of creditors or purchasers have attached.³

¹ See *Carpenter v. Mayer*, 5 Watts, 483; *McMarlan v. English*, 74 Pa. St. 296.

² The term "immediate" can probably mean nothing more than reasonable promptness. See *Cass v. Perkins*, 23 Ill. 382; *People's Mut. Acc. Ass'n v. Smith*, 126 Pa. St. 317, 17 Atl. R. 605, 12 Am. St. R. 870; *Lyon v. Railway Passenger Assur. Co.*, 46 Iowa, 631.

In *Seymour v. O'Keefe* (1876), 44 Conn. 128, the court say that "the rule on this subject should be, and is, that 'a purchaser of personal property is bound in every instance to take immediate possession, if it is practicable.' *Ingraham v. Wheeler*, 6 Conn. 277. But what if it is not practicable? Then we say he is bound to take possession, or do that which is equivalent, in a reasonable time. But 'reasonable time' must be construed, not with reference to the mere convenience of the party, but only with reference to the time fairly required to perform the act of taking possession, or doing what is equivalent. We must construe the exception to the rule requiring immediate possession, in the spirit of the rule itself."

In Kentucky, where the statute does not require an "immediate"

change of possession, the fact that the property, at the time of the sale, was in such a condition that a change could not then be made without serious loss, was held to excuse a speedy change. *Kenton v. Ratcliff*, — Ky. —, 49 S. W. R. 14.

³ *Gilbert v. Decker* (1885), 53 Conn. 401, 4 Atl. R. 685 [citing *Bartlett v. Williams*, 1 Pick. (Mass.) 288; *Shumway v. Rutter*, 8 Pick. 447, 19 Am. Dec. 340; *Kendall v. Samson*, 12 Vt. 515; *Blake v. Graves*, 18 Iowa, 312; *Cruikshank v. Cogswell*, 26 Ill. 366; *Clute v. Steele*, 6 Nev. 335; *Berry v. Ensell*, 2 Gratt. (Va.) 333; *Sydnor v. Gee*, 4 Leigh (Va.), 535; *Coty v. Barnes*, 20 Vt. 78; *Wilson v. Leslie*, 20 Ohio, 161; *Brown v. Webb*, 20 Ohio, 389; *Frank v. Miner*, 50 Ill. 444]; *Dolan v. Van Demark*, 35 Kan. 304, 10 Pac. R. 848.

A few cases are *contra*. *Watson v. Rodgers*, 53 Cal. 401 [this and the other cases in that State are controlled by peculiar language of the statute]; *Carpenter v. Mayer*, 5 Watts (Pa.), 483 [but see *Hoofsmith v. Cope*, 6 Whart. (Pa.) 53, and *Smith v. Stern*, 17 Pa. St. 360]; *Gardinier v. Tubbs*, 21 Wend. (N. Y.) 169 [but see *Levin v. Russell*, 42 N. Y. 251, and *Murray v. Riggs*, 15 Johns. 571].

§ 964. — “Actual.”—With respect to the character of the change of possession, the statutes referred to require that it shall be both “actual” and “continued,” while courts in States in which no statute exists have declared that it must be “actual, visible and continued.” The requirement of an “actual” change of possession cannot be made much clearer by the use of words; neither can there be any *a priori* statement of what shall be sufficient in a given case to constitute an actual change of possession. The change must be actual, open, unequivocal, and of such a character as shall reasonably apprise creditors and purchasers of the change of ownership;¹ but there is no arbitrary test of sufficiency. The law necessarily accommodates itself to the nature and description of the

¹ In a Colorado case the court said: “The vendee must take the actual possession; and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee’s using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property.” *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. R. 705 [citing *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. R. 966; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. R. 809]. In a California case (*Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500), the court said: “The delivery must be made of the property; the vendee must take actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new

owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property.” To this effect are all of the cases. *Chenery v. Palmer*, 6 Cal. 119, 65 Am. Dec. 493; *Corgan v. Frew*, 39 Ill. 31, 89 Am. Dec. 286; *Jarvis v. Davis*, 14 B. Mon. (Ky.) 424, 61 Am. Dec. 166; *Peabody v. Carrol*, 9 Mart. (La.) 295, 13 Am. Dec. 305; *Ludwig v. Fuller*, 17 Me. 162, 35 Am. Dec. 245; *Call v. Gray*, 37 N. H. 428, 75 Am. Dec. 141; *Born v. Shaw*, 29 Pa. St. 288, 72 Am. Dec. 633; *Brawn v. Keller*, 43 Pa. St. 104, 82 Am. Dec. 554; *Sleeper v. Pollard*, 28 Vt. 709, 67 Am. Dec. 741; *Wheeler v. Selden*, 63 Vt. 429, 21 Atl. R. 615, 12 L. R. A. 600; *Stephens v. Gifford*, 137 Pa. St. 219, 20 Atl. R. 542, 21 Am. St. R. 868; *Renninger v. Spatz*, 128 Pa. St. 524, 18 Atl. R. 405, 15 Am. St. R. 692; *Etchepare v. Aguirre*, 91 Cal. 288, 27 Pac. R. 668, 25 Am. St. R. 180; *Stewart v. Nelson*, 79 Mo. 524; *Wright v. McCormick*, 67 Mo. 426.

The mere presence of witnesses is not enough. *Cutting v. Jackson*, 56 N. H. 253; *Wolf v. Kahn*, 62 Miss. 814.

property, the situation of the parties and the circumstances of the case.¹ Many kinds of property admit of an actual, physical change of location at the time of the sale, but other kinds or other circumstances may admit of a symbolical delivery only, or of a change of control merely, while the physical location continues unchanged.² The difficulty therefore remains

¹ *Tunell v. Larson*, 39 Minn. 269, 39 N. W. R. 628; *Lathrop v. Clayton*, 45 Minn. 124, 47 N. W. R. 544 [citing *Boynton v. Veazie*, 24 Me. 286; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9, 99 Am. Dec. 752; *McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. R. 588; *Kingsley v. White*, 57 Vt. 565; *Webster v. Anderson*, 42 Mich. 554, 4 N. W. R. 238, 36 Am. R. 452; *Manton v. Moore*, 7 T. R. 67].

² **Constructive delivery.**—In *McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. R. 588, *Sharswood, J.*, said: "But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it be not indeed impossible, but injurious and unusual, to remove the property from where it happens to be at the time of the transfer. *Clow v. Woods*, 5 Serg. & R. (Pa.) 275, 9 Am. Dec. 346; *Cadbury v. Nolen*, 5 Pa. St. 320; *Linton v. Butz*, 7 Pa. St. 89, 47 Am. Dec. 501; *Haynes v. Hunsicker*, 26 Pa. St. 58; *Chase v. Ralston*, 30 Pa. St. 539; *Barr v. Reitz*, 53 Pa. St. 256; *Benford v. Schell*, 55 Pa. St. 393. In such cases it is only necessary that the vendee should assume the control of the subject so as reasonably to indi-

cate to all concerned the fact of the change of ownership."

Ponderous goods.—"Where the goods are ponderous actual delivery is not required; a constructive delivery may be implied from various acts, among which are designating them for the use of the purchaser by marking, or removing them for the purpose of being delivered." *Hall v. Richardson*, 16 Md. 396, 77 Am. Dec. 303 [citing *Clary v. Frayer*, 8 Gill & J. 398; *Van Brunt v. Pike*, 4 Gill, 270, 45 Am. Dec. 126; *Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294; *Hodgson v. Le Bret*, 1 Camp. 233]; *White v. McCracken* (1895), 60 Ark. 613, 31 S. W. R. 882.

In *Kingsley v. White* (1885), 57 Vt. 565, it is said that the "controlling elements, which take such property out of the operation of the ordinary rule requiring a change of possession to perfect the sale of the property from attachment by the creditors of the vendor are the character and situation of the property; that is, that the property is ponderous, incapable of personal possession, and difficult of removal. To hold that such property comes within the operation of the ordinary rule would practically preclude any sale of it which would be valid against attachment by the creditors of the vendor." It was there held that a sale of saw logs piled on land so low and wet that it was impossible to remove them without a cost exceeding their

that while, in the abstract, the rule is certain, its application to the infinitely various combinations of species, location and

value was valid without any actual change of possession; citing *Sanborn v. Kittredge*, 20 Vt. 632, 50 Am. Dec. 58; *Hutchins v. Gilchrist*, 23 Vt. 82; *Birge v. Edgerton*, 28 Vt. 291; *Fitch v. Burk*, 38 Vt. 683; *Sterling v. Baldwin*, 42 Vt. 306; *Ross v. Draper*, 55 Vt. 404, 45 Am. R. 624. "No such delivery and actual and continued change of possession of such bulky property could be expected or insisted upon. Yet there should be, even of bulky articles, such a clear and unequivocal designation thereof that creditors or subsequent purchasers could not be misled or be in doubt as to the nature of the transaction." *Anderson v. Brenneiman* (1880), 44 Mich. 198.

Part delivered as token of all.—There may be a delivery of part as token of the whole. *Hobbs v. Carr* (1879), 127 Mass. 532; *Ingalls v. Herrick* (1871), 108 Mass. 351, 11 Am. R. 360; *Legg v. Willard*, 17 Pick. (Mass.) 140; *Shurtleff v. Willard* (1837), 19 Pick. 202.

No symbolical delivery where actual delivery possible.—A symbolical or constructive delivery will not suffice where an actual one is reasonably practicable. *Billingsley v. White*, 59 Pa. St. 464; *McKibben v. Martin*, 64 Pa. St. 352, 3 Am. R. 588; *Steelwagon v. Jeffries*, 44 Pa. St. 407.

Goods in hands of bailee.—Where the property is in the possession of a bailee, he "must at least be notified of the sale and he must thereafter hold it for the vendee or mortgagee. *Wheeler v. Nichols*, 32 Me. 233; *Bentall v. Burn*, 3 B. & C. 423; *Cushing v. Breed*, 14 Allen, 376; *Boardman v. Spooner*, 13 Allen, 353; *Appleton v.*

Bancroft, 10 Metc. 236. . . . If he is notified of the transfer he will cease to hold as the agent of the vendor, and if he still retains possession he will become the agent of the vendee by operation of law. *Hodges v. Hurd*, 47 Ill. 363." *Buhl Iron Works v. Teuton* (1888), 67 Mich. 623, 35 N. W. R. 804.

Issue and delivery of warehouse receipt for wheat in seller's public warehouse is sufficient (*Broadwell v. Howard* (1875), 77 Ill. 305); and goods in possession of carrier may be transferred by delivery of the bill of lading or receipt. *Green Bay National Bank v. Dearborn* (1874), 115 Mass. 219.

But in *Hallgarten v. Oldham* (1883), 135 Mass. 1, 46 Am. R. 433, it is said that the delivery required is a "delivery in its natural sense, that is, a change of possession;" and *Green Bay National Bank v. Dearborn*, *supra*, is questioned. See also *Dempsey v. Gardner* (1879), 127 Mass. 381; *Dugan v. Nichols* (1876), 125 Mass. 43.

Goods in hands of servant.—The rule as to bailees would not ordinarily apply to servants or others whose possession is merely that of the owner. *Bump*, *Fraud. Conv.* (4th ed.), § 157.

Goods already in vendee's possession.—Where the goods are already in the possession of the vendee, it is not necessary to go through the idle ceremony of restoring them to the seller that he may then deliver them again to the vendee. *Nichols v. Paten* (1841), 18 Me. 231, 36 Am. Dec. 713; *Lake v. Morris* (1861), 30 Conn. 201.

Delivery to common carrier for transportation to buyer.—An unconditional delivery of the goods

surroundings is necessarily uncertain, and conflicting results may be worked out from apparently similar cases. There

to a common carrier, consigned to the vendee, is a sufficient delivery. *Hope Lumber Co. v. Foster & Logan Hardware Co.* (1890), 53 Ark. 196, 13 S. W. R. 731.

Goods remaining in hands of seller as bailee of buyer.—But where all the delivery or change of possession practicable has taken place, the goods may be left in the possession of the seller as bailee for the buyer, without necessarily rendering the sale voidable by creditors. *Ingalls v. Herrick* (1871), 103 Mass. 351, 11 Am. R. 360. As said in *Thorndike v. Bath* (1873), 114 Mass. 116, 19 Am. R. 318; "it often happens, especially in the case of bulky articles, that an effectual delivery is made, although it does not appear that the thing sold was removed by the buyer or came literally into his personal custody. The books are full of cases in which constructive or symbolic delivery is held to be equivalent to actual delivery, without a visible change of possession. The thing sold may remain in the hands of the seller, and yet the title may pass effectually to the buyer. This has repeatedly been decided in the case of the sale of a horse which the buyer leaves in the custody of the seller. *Tuxworth v. Moore*, 9 Pick. 347; *Bullard v. Wait*, 16 Gray, 55; *Elmore v. Stone*, 1 Taunt. 458. In the last of these cases the horse had been removed into another stable, but the court say that that fact was wholly immaterial. It is sufficient if the parties agree that the seller is to retain the possession, not under his lien for the price, but as the agent or bailee of the buyer. In *Marvin v. Wallis*, 6 E. & B. 726, the

seller retained the horse in his possession for his own use, by consent, or, in other words, as a borrower, and it was held that he was a bailee of the buyer, and that the delivery was sufficient. The possession of the seller continued uninterrupted, but the nature of his holding had changed. In *Barrett v. Goddard*, 3 Mason, 107, goods lying in a warehouse were sold by marks and numbers, and paid for by a promissory note on six months' credit, it being part of the bargain that the goods should remain at the option and for the benefit of the buyer at the seller's warehouse, rent free, for the time being. It was held by Mr. Justice Story that the delivery was sufficient against subsequent purchasers, and that the continuance of possession by the seller did not prevent the delivery from being effectual, if the sale was otherwise complete and nothing remained to be done on the part of the buyer, and if it was a part of the bargain that they should remain with the seller. In *Beecher v. Mayall*, 16 Gray, 376, it was held that where steam boilers were left in the possession of the seller to be repaired for the buyer, no further evidence of delivery was necessary, for the seller's possession would be in that case the buyer's possession."

In this case of *Thorndike v. Bath*, a person saw an unfinished piano in the maker's shop, and offered to purchase it of him if he would finish it. The offer was then and there accepted, a bill of sale was at once made, and the price was paid at a subsequent day, but the piano remained in the shop to be finished. It

must, however, in general terms, be the most complete and un-

was held that this evidence would authorize a jury in finding a delivery of the piano sufficient to pass the title as against a subsequent purchaser.

In *Ropes v. Lane* (1865), 9 Allen (Mass.), 502, (1866) 11 Allen, 591, *Wonson & Bros.* contracted to sell to plaintiffs all the mackerel they should pack that year; the mackerel so packed were stored under plaintiffs' supervision, before November 21st, in certain warehouses of the sellers until they were filled, and the residue was piled up on their wharves. "On the 19th of December the plaintiffs settled their account with *Wonson & Bros.*, having overpaid the bills. The parties then went upon the wharf; one of the *Wonsons* opened the doors of the warehouses; one of the plaintiffs saw the condition of the warehouses and the barrels on the wharf not housed or covered, and it was agreed that the mackerel should be stored during the winter in the warehouses and on the wharves for a certain price agreed. All the barrels had then been inspected and branded, and were ready for immediate shipment." On November 21st *Wonson & Bros.* had contracted for the sale of mackerel to others, whose agent on that day visited the warehouses, saw the mackerel already stored there under the supervision of plaintiffs, supposed it to belong to *Wonson & Bros.*, and took, for his principals, a warehouse receipt for it. It was held that there had been a sufficient delivery to perfect the title of the plaintiffs. See also *Shaul v. Harrington* (1891), 54 Ark. 305, 15 S. W. R. 835; *Hotchkiss v. Hunt*, 49 Me. 213

(quoted in a following note); *Goodwin v. Goodwin* (1897), 90 Me. 23, 37 Atl. R. 352, 60 Am. St. R. 231.

Many other cases will be found cited in the following notes.

Delivery on rescission or resale.

In general, on rescission or resale there must be the same delivery as against creditors as required on original sale. *Folsom v. Cornell* (1889), 150 Mass. 115, 22 N. E. R. 705 (citing *Miller v. Smith*, 1 Mason, 437; *Quincy v. Tilton*, 5 Greenl. (Me.) 277; *State v. Intoxicating Liquors*, 61 Me. 520); *Colcord v. Dryfus* (1893), 1 Okla. 228, 32 Pac. R. 329. "But where, by the terms of the agreement, or by a fair implication therefrom, the article thus sold or resold is to remain in the possession of the vendor for a specific time or for a specific purpose, as part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be complete and sufficient." *Hotchkiss v. Hunt* (1860), 49 Me. 213.

Delivery of growing crops.—The delivery required in the case of a growing crop is involved in some dispute. According to the prevailing rule such a crop, while growing, and until ready for harvest—not being capable without destruction of a physical removal from the land on which it grows,—can only be actually delivered by a delivery of the land; and where that is impracticable the best practical delivery will suffice. In some States such crops are held not to be goods and chattels in the possession or under the control of the vendor, within the meaning of the statutes requiring an act-

equivocal delivery of which the circumstances will reasonably admit.¹

ual and continued change of possession. See *Davis v. McFarlane* (1869), 37 Cal. 634, 99 Am. Dec. 340; *Robbins v. Oldham* (1863), 1 Duvall (Ky.), 28; *Morton v. Ragan* (1869), 5 Bush (Ky.), 334. In Illinois actual change of possession is not necessary. *Graff v. Fitch* (1871), 58 Ill. 373, 11 Am. R. 85; *Thompson v. Wilhite* (1876), 81 Ill. 356; *Ticknor v. McClelland* (1877), 84 Ill. 471; also *Bellows v. Wells* (1864), 36 Vt. 599.

But in Iowa actual and visible change is required. *Smith v. Champney* (1878), 50 Iowa, 174.

In the case of crops, not emblements, like growing grass, see *Lamson v. Patch* (1863), 5 Allen (Mass.), 586, 81 Am. Dec. 765. See also *Stone v. Peacock* (1853), 35 Me. 385.

¹**Illustrations of insufficient delivery.**—Thus, where two ladies, who had been carrying on the millinery business, became insolvent and sold their stock without invoicing and upon long credit without security to their brother-in-law, a lawyer of another town, who left them in possession, and made no change in signs or outward indications of ownership, the sale was held void as to creditors. *Roberts v. Radcliff*, 35 Kan. 502. And so, where the seller of a lot of wood took the buyer to the open place where it was piled and said, "There is the wood. I deliver it to you," and the buyer walked around the pile and went once or twice a week to see if it was undisturbed, but put no mark on it and did not repile or otherwise deal with it, it was held not enough. *Wilson v. Hill*, 17 Nev. 401, 30 Pac. R. 1076. And where there was a sale of a lot

of hay which the buyer paid for and took away in part, but left the residue in the seller's barn as before, it was held not enough. *Merrill v. Hurlburt*, 63 Cal. 494. And where after the sale of hogs they were left with the seller on his farm to be fed, instead of being taken to the buyer's farm not far away, it was held not a sufficient change of delivery. *Thompson v. Wilhite*, 81 Ill. 356. And so where on a sale of lumber the seller and buyer went in sight of the piles in the seller's lumber-yard, and the seller said, "There is the lumber," and that the buyer could do what he pleased with it, but the buyer left it where it was, made no account of the piles and exercised no other control over them than to request a third person to "keep his eye on them," it was held not enough. *Cobb v. Haskell*, 14 Me. 303, 31 Am. Dec. 56. The mere marking of goods (*Stewart v. Nelson*, 79 Mo. 522), or changing the name on a store (*Klee v. Reitzenberger*, 23 W. Va. 749), is not enough where everything else remains as before. Where a master sold his servant a horse to be paid for in work, and the servant kept the horse on his master's farm where he was at work, feeding out of the master's hay and grain, and training and caring for it with the horses of the master, it was held not enough as against the master's creditors. *Hull v. Sigsworth*, 48 Conn. 258, 40 Am. R. 167 (*contra*, *Webster v. Anderson*, 42 Mich. 554, 4 N. W. R. 288, 36 Am. R. 452, *post*). Where a team of horses, harness and wagon were sold, but remained, by arrangement, in seller's barn in charge of former employee

§ 965. — “Continued.”—The change of possession must also be “continued.” This requirement, like the others, is to

of seller, it was held not enough. *Stephens v. Gifford*, 137 Pa. St. 219, 20 Atl. R. 542, 21 Am. St. R. 868. Where a proprietor sold out to his clerk, but both continued as before, signs were unchanged and old licenses remained posted, it was held not enough. *Wolf v. Kahn*, 62 Miss. 814. So three hundred and twenty-four cords of wood were piled along roadside. M. and plaintiff walked to place where wood was piled, and M. pointed it out and said, “There is the wood; I deliver it to you as security for the money loaned.” The two persons walked around the pile and returned home. No mark or sign of any kind was put upon the wood. Plaintiff visited the pile every day for a week to see that it was not interfered with, and after the first week from two to three times a week. He sold seven cords and gave M. credit therefor and employed M.’s father-in-law to deliver the wood sold. *Held*, an insufficient delivery and change of possession as against attaching creditor. *Wilson v. Hill* (1883), 17 Nev. 401, 30 Pac. R. 1076. W. sold plaintiff a quantity of corn in cribs on his (W.’s) farm, and received part payment. W. continued in possession of farm and in apparent possession of the corn, and fed some three hundred or four hundred bushels of it to his stock. There was nothing to indicate to general public that there had been a sale of the corn. *Held*, no sufficient delivery. *Hewett v. Griswold* (1891), 43 Ill. App. 43. F. owned a meat market and spent most of her time looking after the business of the market, and was assisted therein by the defendant.

She made a bill of sale of the market to the defendant and was afterwards in and about the market as before. Defendant told several persons he had “bought her out,” and that she was at work for him. No new sign was put up, and no notice of the sale was published in the local newspaper. After the alleged sale, F., when asked if she had sold out, replied, “They say I have,” and finally said, “I sold out to that man,” pointing to defendant. *Held*, no sufficient change of possession. *Donovan v. Gathe* (1893), 3 Colo. App. 151, 32 Pac. R. 436. Plaintiff, a member of the A. Co., and its creditor for moneys advanced, took up draft and paid demurrage charges on goods consigned to A. Co., but held by the railroad company for charges. W., the A. Co.’s manager, placed the goods in a warehouse, in the plaintiff’s name, as he testified, but the warehouse books credited them to A. Co. Later the A. Co. sold plaintiff all its property in these goods. Plaintiff notified a clerk at the warehouse that he would soon want the goods shipped to his factory and would pay charges on them. *Held*, he had failed to show any delivery of the goods followed by an actual and continued change of possession. *Springer v. Kreeger* (1893), 3 Colo. App. 487, 34 Pac. R. 269. Purchaser of four barrels of whisky, having at the time no room for them in his own store, rolled them apart from the rest of the stock in the seller’s store, and marked them with purchaser’s brand and agreed to remove them in a few days. *Held*, no change of possession. *Burchinell v. Weinberger* (1893), 4 Colo. App. 6, 31

be interpreted in view of the purposes to be subserved. It is designed to prevent mere temporary, formal and colorable

Pac. R. 911. Claimant offered to buy horses then in pasture of a third party, and owner next day sent his hired man to accept offer. Claimant agreed with hired man that latter should deliver the horses and that claimant would pay for the service upon receiving the horses. Hired man took the horses from the pasture, but on the way to deliver them stopped at the house of the owner for the night, and while there they were taken on attachment. *Held*, no sufficient delivery. *Watkins v. Petefish* (1892), 49 Ill. App. 80. Man sold horses to his wife, but managed them after the sale just as he had done before, except that after the sale he acted as her agent. *Held*, no sufficient change of possession. *Murphy v. Mulgrew* (1894), 102 Cal. 547, 36 Pac. R. 857. Plaintiff's son-in-law, with whom she lived part of the time, gave her a bill of sale of eight horses and forty tons of hay then on his ranch. The goods remained on the ranch, and he used the horses as before giving the bill of sale. At or within two days after the giving of the bill of sale the son-in-law deeded the plaintiff an undivided half interest in the ranch and the deed was immediately recorded. *Held*, no sufficient delivery and change of possession of the goods. *Dorman v. Soto* (Cal., 1894), 36 Pac. R. 588. R. met B. on the road in the latter part of August, and bargained for corn then not cut; nothing else was said or done until about the first of October, when R. visited the farm on which the corn was growing and walked through it. No further possession was ever taken, and under the con-

tract B. was to feed the corn to R.'s cattle that winter. *Held*, that there had been no delivery. *State ex rel. Redmon v. Durant* (1893), 53 Mo. App. 493.

One Hamel sold a horse to William Doucet for \$145, to be paid in one year. Doucet paid \$47.90 during the year, but was unable to pay more. At end of year Hamel went to Doucet's house to collect the balance. Doucet said he had not the money, but would sell the horse to get it. Hamel said that Doucet need not sell the horse, as he, Hamel, would take it back, to which Doucet agreed. At this point, and before anything further had been done, Simeon W. Doucet, William's son, came up and offered to buy the horse. It was then agreed by all three that Hamel should keep the \$47.90 already paid by William, and that Simeon should pay Hamel \$103 more in monthly instalments. Hamel did not take possession of the horse, or deliver possession to Simeon, nor did Simeon receive possession from William; but it was agreed between William and Simeon that William should keep and use the horse for his keeping so long as Simeon boarded with William. The horse remained in William's stable as before and was used by William in his business. Simeon paid Hamel in full and received a bill of sale, but afterwards the horse was attached as the property of William. *Held*, no sufficient change of possession and creditors could hold. *Doucet v. Richardson* (1893), 67 N. H. 186, 29 Atl. R. 635. W. sold certain goods to R., who took possession, but never

changes of possession, which might fall within the letter of the rule but not within its spirit. It does not mean that the

paid for them. Later R. wished W. to take back such portion of the goods as he had not yet sold and give him credit accordingly on the debt. W. agreed, and gave credit, but instructed R. to act as its agent and sell the goods on its account and remit proceeds. *Held*, that this was a resale and not merely a rescission of the original sale, and that as there was no delivery of possession, the sale was fraudulent as to attaching creditors of R. *Whiting Mfg. Co. v. Gephart* (1893), 6 Wash. 615, 34 Pac. R. 161. A stock of goods was sold to a clerk of the vendor who had been in the store in the employ of the vendor for some months. No inventory of stock was taken upon making the sale. The signs on the store were unchanged, and there was nothing to indicate a change of possession, though, upon making the sale, the vendor said to the vendee, "the goods are yours," and left the store and did not return. *Held*, that the sale was void, there being no immediate delivery and actual and continued change of possession. *Lloyd v. Williams* (1895), 6 Colo. App. 157, 40 Pac. R. 243. H. bought cattle of W. W. put them in a "stalk field" which he had bought professedly for himself, but really for H. *Held*, no change of possession. *Harris v. Pence* (1895), 93 Iowa, 481, 61 N. W. R. 927. A stepfather delivered to his stepson, who had been living with him on his ranch, a lease thereof, reserving two rooms of the house thereon for his own use, and at the same time gave the stepson, for value, a bill of sale of sheep and hogs running on the ranch. The lease

was never recorded, and the parties thereto continued to live together on the ranch as before, without any change in their relations or in their possession of the chattels being manifest to the world. *Held*, no actual and continued change of possession. *Kennedy v. Conroy* (Cal., 1896), 44 Pac. R. 795. Alleged vendee of store and stock of goods did not take possession and left the same manager and clerks in charge. Vendor's name remained on the window-shades and in the newspaper advertisements, and bills were made out to vendor and paid by manager without objection. Sale held fraudulent as made without immediate delivery and actual change of possession. *Howard v. Dwight* (1896), 8 S. Dak. 398, 66 N. W. R. 935. D. purchased from A. about eleven thousand raisin trays in payment of a debt. The trays were not removed from the shed on A.'s farm where they were stored, but D. wrote his name on a large number of them and kept a man continuously at A.'s house to look after the trays. *Held*, no sufficient open and continuous change of possession. *Byxbee v. Dewey* (Cal., 1896), 47 Pac. R. 52. The only thing done at the time of the sale was to put the brother of the vendee in charge of the store. The name of the new proprietor was not placed upon the building nor was the sign of the old removed. *Held*, no sufficient change of possession. *Revercomb v. Duker* (1898), 74 Mo. App. 570.

Illustrations of sufficient delivery.—On the other hand, in *Webster v. Anderson*, 42 Mich. 554, 4 N. W. R. 288, 36 Am. R. 452, where a farm

change of possession shall continue unbroken indefinitely, or that the goods shall never, for any purpose, come again into

hand accepted from his employer twenty hogs in payment for his services, with the understanding that they should remain on the farm with the employer's hogs until they could be sold, it was held a sufficient delivery. "It was all the delivery that could well have been made under the circumstances, without requiring Anderson (the buyer) to remove the hogs from the farm where he was employed, to some other place where they would have been less in his possession than where they were." (*Contra*, *Hull v. Sigsworth*, 48 Conn. 258, 40 Am. R. 167. See also *Thompson v. Wilhite*, 81 Ill. 356, both *ante*.) On a sale of household goods, where the seller moved out of the house in which they were, and delivered the keys to the buyer, it was held enough. *Barr v. Reitz*, 53 Pa. St. 256. Where two brothers lived together, and one bought a carpet for their home, but did not pay for it, and the other then went and paid for it and took a bill of sale to himself, it was held sufficient change. *Evans v. Scott*, 89 Pa. St. 136.

Further illustrations are the following: Plaintiff bought from M. a mare then pasturing on the land of W., five miles distant. He went to take possession of her, but W. was not at home. On his way back he met W., and arranged with him to remove the mare a few days later, and on the day specified he placed her on another ranch under an agreement with the manager thereof, who received and held her for plaintiff. *Held*, a sufficient compliance with the requirement of immediate delivery. *Cameron v. Calberg* (Cal., 1892),

31 Pac. R. 530. Plaintiff's husband sold her sixteen mares in satisfaction of a debt. The mares were pastured on the husband's lands prior to the sale, and branded with his brand. At the time of the sale they were brought to the corral, vented with the husband's brand, and then branded with the plaintiff's brand, and a bill of sale was given. They were then turned back on the range where they were before, and cared for, at season requiring care, by men hired by and paid by the plaintiff. *Held*, a sufficient delivery and change of possession. *Asbill v. Standley* (Cal., 1892), 31 Pac. R. 738. R. & Co. executed a bill of sale to plaintiffs, creditors of R. & Co., of twelve thousand bushels of charcoal in pits on the lands of R. & Co. Plaintiffs made no attempt to remove the coal, but caused, a few days later, small cards to be placed on the pits, with their name thereon; they also placed a man in charge of the pits, who remained in charge about two weeks, and then left, requesting a person on an adjoining ranch to look after the coal, and such person made occasional visits each day to the pits. *Held*, a sufficient change of possession. *Tognini et al. v. Kyle* (1882), 17 Nev. 209, 30 Pac. R. 829. During negotiations for the sale of the stock of goods the store was closed. After the consummation of the sale the store was reopened with the prior owner as salesman and manager for the new owner. All creditors of the prior owner were immediately notified, announcement of the sale was published for two weeks in the local papers, and Bradstreet's was notified of the sale. *New*

the possession of the seller. As was said by Chief Justice Redfield, "after a sale of personal chattels has become perfected

letter-heads were immediately procured and used, showing the new owner as proprietor. Business was conducted in the name of the new owner, and she was frequently in the store, though not engaged in selling goods. *Held*, a sufficient change of possession. *Pollard v. Farwell* (1892), 48 Mo. App. 42. The sale of seven horses to plaintiff was actually *bona fide*, and there was immediate delivery. Soon after the delivery the plaintiff employed a man, formerly in the employ of vendor, and put this man in charge of the horses; with six of them in a team, he and the said vendor, with a like team, did a large amount of plowing for a third person; for convenience in working while doing the plowing, one of the horses of plaintiff's team was interchanged with one of the horses of the vendor's team. *Held*, that this evidence supported the finding of "an actual and continued change of possession." *Freeman v. Hensley, Sheriff* (Cal., 1892), 30 Pac. R. 792. Buggies in a "knock-down" condition (parts in boxes and crates) were stored in warehouse. Vendor took vendee's agent to the warehouse, pointed out the goods sold, locked the warehouse and gave the key to the agent, who thereafter retained it. *Held*, a sufficient delivery and actual and continued change of possession, even though goods of third person were also stored in the warehouse, and such third person had been given a key and had been promised that he should have exclusive possession. *Morrison v. Oium, Sheriff* (1892), 3 N. Dak. 76, 54 N. W. R. 288. The lessee, B., of a dairy farm, living

elsewhere, sold his cows, fixtures and equipments of the farm to an employee, P., whom he had placed in charge of the farm. A few months later, P., being unable to pay, resold the property to B., in presence of two witnesses, but the property was bailed to P. for use for a period of eight months. Shortly afterward S. levied upon the property and sold it as the property of P. B. gave notice both before and at such sale that the property was his own. Jury found utmost good faith on part of both B. and P. *Held*, a sufficient delivery and continued change of possession. *Bell v. McCloskey* (1893), 155 Pa. St. 319, 26 Atl. R. 547.

Plaintiff bought of N. certain corn, standing in two pieces, the corn to be cribbed or thrown into piles as he might elect. He rode through both pieces, and paid \$25 on one and \$60 on the other. Later one piece was cut and partly shocked. *Held*, there had been sufficient delivery and change of possession. *State ex rel. Wright v. Casteel* (1892), 51 Mo. App. 143. T. Co. owned two engines in the possession of W., who held as bailee. T. Co. sold them to appellant, and both T. Co. and appellant notified W. of the sale and instructed him to hold for appellant. *Held*, a sufficient delivery and change of possession. *Nat. Bank of Chambersburg v. Buckeye I. & B. Works* (1892), 46 Ill. App. 526. Firm engaged in merchandising sold out its business to a creditor firm. Latter took possession, removed the old sign-board, put its own in place, and advertised the change, but retained one of the members of the vendor firm to act as salesman. *Held*,

by such a visible, notorious and continued change of possession that the creditors of the vendor may be presumed to have

a valid sale. *Loucheim v. Seyfarth* (1893), 49 Ill. App. 561. G. was indebted to his brother, the defendant, in various sums for wages, loans, etc. Defendant was in possession of G.'s store as clerk and manager. He pressed G. for payment and G. gave him a bill of sale of the stock of goods in the store in payment of the debt. Defendant immediately changed the advertisements, and advertised himself as proprietor, notified the landlord of the purchase and himself became tenant, and refused to receive goods consigned to G. *Held*, a sufficient delivery and change of possession. *Martin v. Duncan* (1893), 47 Ill. App. 84. The owner of a large pasture on which he and another pastured their horses together, and on which both lived (but in separate houses), sold that other some of his horses. Such horses remained in the pasture as before. *Held*, a sufficient delivery and change of possession. *Traders' Nat. Bank of Ft. Worth v. Day* (1894), 87 Tex. 101, 26 S. W. R. 1049. At the time of the sale the whisky was stored in a bonded warehouse, only to be removed upon surrender of the certificates and compliance with their conditions. The certificates were in the hands of pledgees, several hundred miles away. Pledgees were immediately notified of the sale and that the purchaser claimed the certificates subject to the pledgees' lien. *Held*, a good delivery and change of possession. *Freiberg v. Steenbock* (1893), 54 Minn. 509, 56 N. W. R. 175. W. was indebted to H. in the sum of about \$800, and made a bill of sale to H. of a portable sawmill, horses, etc., for the expressed consideration of \$1,000, under oral agreement that bill of sale should not be given nor possession surrendered until H.'s credit should by his further employment by W. increase W.'s indebtedness to him to the sum of \$1,000, when the bill should be delivered and possession immediately given. This arrangement was carried out, and upon the debts reaching the amount agreed upon, the bill of sale was delivered by W. to H., and H. took immediate possession and put up a plain sign on the mill, "A. Hawn, Successor to George Wright." *Held*, that as there was no sale until the condition was complied with, and that as upon compliance therewith there was immediate delivery and continued change of possession, the sale was valid as against creditors subsequently attaching. *Roberts v. Hawn* (1894), 20 Colo. 77, 36 Pac. R. 886. W. sent C. a bill of sale of property in the possession of M. which was to be operative upon C.'s paying a note made by W. and M. and paying the bill of M. for the care of the property up to time of acceptance. After some correspondence, C. accepted the offer, paid M.'s bill and either paid or guaranteed the note, and immediately took possession. *Held*, that the sale dated not from the delivery of the bill of sale but from the date of acceptance of the conditions under which it was to become operative, and that there was thus immediate delivery and change of possession. *Cornwall v. Mix* (Idaho, 1893), 34 Pac. R. 893. C. was a baker, and had been in employ of R. for nearly a year. R. owed

notice of it, the vendee may lend or let or employ the vendor to sell or perform any other service about the thing with the

him for such labor \$369.55, and being unable to pay proposed to sell him the stock of goods. An inventory was taken, a schedule made and the goods transferred by bill of sale. Rooms in which business was carried on and fixtures were leased to C. for three months, and keys and possession were delivered, and the next night a sign with name of C. as successor to R. was placed on the building. *Held*, a sufficient change of possession. *Eversman et al. v. Clements* (1895), 6 Colo. App. 224, 40 Pac. R. 575.

S. transferred to F. certain personal property upon F.'s undertaking to satisfy a certain claim which F. & Co. had against S. F. & Co. agreed to this and gave S. a receipted bill, acknowledging payment of the said claim, and charged F. with the amount upon account. S. ran a bar in the W. Hotel. The goods in question were turned over to F., who put them in an unoccupied room in the basement of the W. Hotel, locked the room and kept sole control of the key. Nobody else had access to the room, and F. put on the door a notice that the goods within were his property. He informed the manager of the W. Hotel what he had done, and the manager consented thereto and to F.'s occupancy of the room, and agreed so far as was necessary to hold the goods for F. *Held*, that the possession was acquired openly and that the sale was good. *Conly v. Friedman* (1895), 6 Colo. App. 160, 40 Pac. R. 348. A corporation carrying on a retail and a wholesale business used a warehouse, on which there was no sign, solely for storing its goods. On a sale by the corpora-

tion of its wholesale business to its manager he took actual possession of the goods in the warehouse; removed other goods, which he had purchased and which had been theretofore in the retail store, to the warehouse; opened a retail and wholesale store in the warehouse, cutting windows therein; placed the sign "Office" over the door; and advertised himself in a newspaper as the successor to the corporation. *Held*, that there was a sufficient delivery. *Crymble v. Mulvaney* (1895), 21 Colo. 203, 40 Pac. R. 499. E. bought a restaurant and paid full consideration therefor. When the bill of sale was made and the purchase price paid, the vendor, J., went with E. to the restaurant and gave E. possession, and after notifying the help of the sale went away, and E. assumed control. J.'s name was never on the outside of the restaurant, and the only sign she ever had there was "Jim's Place." This sign was allowed to remain. The bills of fare were not changed at the time of the sale. *Held*, a sufficient change of possession. *Burchinell v. Smidle* (1895), 5 Colo. App. 417, 33 Pac. R. 1097. R. executed to D. a bill of sale of goods in his store and at the same time conveyed to him certain accounts and real estate; D. immediately took the keys of the store, locked the door, made a temporary arrangement with R. to act as his clerk, and opened the store early the next morning, when W. levied on the goods. *Held*, an immediate and sufficient change of possession under the bill of sale. *Drury v. Wilson* (1896), 38 N. Y. S. 538, 4 App. Div. 232. Heavy printing ma-

same safety he may a stranger.”¹ And many cases apply a still more liberal rule.²

chinery and appliances located in leased rooms were sold in good faith, and vendor locked the doors and surrendered the keys to the vendee. *Held*, a sufficient delivery. *Kellogg Newspaper Co. v. Peterson* (1896), 162 Ill. 158, 44 N. E. R. 411, affirming 59 Ill. App. 89. H. bought from P. and paid valuable consideration for certain brick lying on the street. He posted on the pile several written or

printed notices advising the public that he had bought the brick, that they were his property and were for sale, and gave in the notices his address and his telephone number. The notices remained posted two or three months, and never at any time after the sale did P. claim or exercise any control over them. At the time of the execution, however, four months after the sale, the notices had disap-

¹ In *Dewey v. Thrall*, 13 Vt. 284. To same effect: *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500; *Gould v. Huntley*, 73 Cal. 399, 15 Pac. R. 24; *Deere v. Needles*, 65 Iowa, 101, 21 N. W. R. 203; *French v. Hall*, 9 N. H. 137, 32 Am. Dec. 341; *Ziegler v. Handrick*, 106 Pa. St. 87.

It is not always necessary that the “public” shall know about the sale nor that the change of possession shall continue until the whole community has become apprised of the fact, provided there has in fact been an actual and open change of possession. Thus, on the sale of a horse, buggy and harness, it is not necessary that the whole community shall be made aware of it in order to make it valid. *Deere v. Needles*, 65 Iowa, 101, 21 N. W. R. 203.

In *Benjamin v. Madden* (1896), 94 Va. 66, 26 S. E. R. 392, there was an actual and *bona fide* sale, and the vendee took possession, but the vendor and his former clerk were retained as salesmen, the vendor's name was continued on the window-shades (this being the only sign), and the vendor's license was not transferred to the vendee. The bill of sale, however, was recorded and the

vendee advertised for a week in the local papers that she had bought the goods and would continue the business. *Held*, a sufficient change of possession.

² Thus, in *Shaul v. Harrington* (1891), 54 Ark. 305, 15 S. W. R. 835, it is said “that a legal delivery, and not a visible change of possession, is all that is required to protect the vendee's title.” “Constructive delivery being enough to satisfy the law, it is an easy transition to constitute the vendor a bailee for the vendee, and so work out a delivery. And it is held that such a delivery is sufficient against creditors. Whenever there is a completed contract of sale, and an agreement by the vendor to hold as bailee for the vendee in lieu of an actual delivery, the sale is complete against creditors if it is not otherwise fraudulent.” Citing *Little Rock & Fort Smith Ry. Co. v. Page*, 35 Ark. 304; *Stinson v. Clark*, 6 Allen (Mass.), 340; *Ingalls v. Herrick*, 108 Mass. 351; *Thorndike v. Bath*, 114 Mass. 116; *Barrett v. Goddard*, 3 Mason, 107; *Webster v. Anderson*, 42 Mich. 554; *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529, 37 N. W. R. 825; *Pregnall v. Miller*, 21 S. C. 385.

§ 966. — “Exclusive.”—The possession of the buyer must, finally, it is said, be an exclusive one—that is, one not

peared. *Held*, a sufficient change of possession. *Hawkins v. Kansas City Hydraulic, etc. Brick Co.* (1895), 63 Mo. App. 64, 1 Mo. App. R. 609. D. purchased and took a bill of sale for wood piled upon the land of a stranger, X., and subject to a lien for cutting. The wood was measured and formally delivered, but was not moved. Within three and one-half hours thereafter M., the seller, paid off the lien of the choppers out of money received from D. *Held*, a sufficient delivery and change of possession. *Dubois v. Spinks* (1896), 114 Cal. 289, 46 Pac. R. 95. W. was indebted to his barkeeper, K., and proposed that if K. would pay him the difference between the debt and the value of the stock in the saloon he would sell such stock to him. K. had left the employ of W. and another barkeeper had been employed. The property was delivered to K., the new barkeeper discharged, and the place locked up by K., who had no license, and who kept the key and was thereafter the only person who entered the place. *Held*, that there was an immediate delivery followed by an actual and continued change of possession. *Howe v. Johnson* (1897), 117 Cal. 37, 48 Pac. R. 978. A vendor delivered to plaintiffs enough wool at nine cents a pound to pay a debt of \$505, which he owed them, and they moved it a considerable distance to the opposite end of the shed and stored it; afterwards the vendor, upon an agreement with the plaintiffs, employed a man who owed him to haul the wool to the station to be shipped in the names of the plaintiffs. *Held*, *prima facie* evi-

dence of sale, delivery and continuous possession. *Everett v. Taylor* (1896), 14 Utah, 242, 47 Pac. R. 75. L. was engaged in other business in S., and on the advice of a friend who was acquainted with the business of the store in F. he bought the stock of goods therein, went to F. for a day, took possession, changed signs, and hired one of the vendor's clerks and left him in charge, while L. himself returned to S. The vendor gave up possession and had nothing more to do with the business for two weeks, at the end of which period L. hired him and put him in charge of the business. *Held*, that there was a substantial and unequivocal change of possession following the sale. *Levy v. Scott* (1896), 115 Cal. 39, 46 Pac. R. 892.

A stone-cutter transferred his stock in trade to his sister in payment of two of his notes held by his sister. The sister continued the business, notified dealers of the transfer and of her sole interest in the business, paid its running expenses, appointed her brother as manager and paid him a salary. *Held*, a sufficient delivery and change of possession. *Kelly v. Mesier* (1897), 46 N. Y. Supp. 61, 18 App. Div. 329. One partner had had nothing to do with the business of the firm for a month, and the other transferred their stock of goods to a creditor at a good valuation in payment of a firm debt. After he had shown the new delivery boy the delivery route, he left the store, leaving it in charge of the purchaser's agent, who had been in the employ of the firm as book-keeper for the month previous. Evidence held sufficient to

concurrent with the possession of the seller.¹ But this rule also, like the others, adapts itself to the circumstances of the

show an actual and continued change of possession. *Stratton v. Burr* (Cal., 1898), 54 Pac. R. 735. A firm composed of father and son sold to the wife and mother jewelry, which was delivered to her and kept by her for three months in her house, where she resided with her husband

and son, except when she intrusted a part of it to them to sell to obtain necessities for the family; they returned it to her upon failing to find a purchaser. *Held*, that there was an actual and continued change of possession as against creditors. In the same case, the mother, after

¹ "The law undoubtedly is," said Sharswood, J. (in *McKibben v. Martin*, 64 Pa. St. 352, 3 Am. R. 588), "that not only must possession be taken by the vendee, but that possession must be exclusive of the vendor. A concurrent possession will not do. 'There cannot in such case,' said Mr. Justice Duncan, 'be a concurrent possession; it must be exclusive, or would by the policy of the law be deemed colorable.' *Clow v. Woods*, 5 S. & R. 275, 9 Am. Dec. 346. And again in *Babb v. Clemson*, 10 S. & R. 428, 13 Am. Dec. 684: 'There cannot be a concurrent possession in the assignor and assignee; it must be exclusive or it is deemed colorable and fraudulent. To defeat the execution there must have been a *bona fide*, substantial change of possession. It is a mere mockery to put in another person to keep possession jointly with the former owner. A concurrent possession with the assignor is colorable.' But what is the concurrent possession which will be deemed such as matter of law? Evidently as owner, or accompanied with the ordinary *indicia* of ownership — such as will lead any person not in the secret to infer that there has been no actual change. The vendor must appear to occupy the same relation to the property as he

did before. In such a case the court must pronounce it fraudulent and colorable *per se*. We have been referred to three cases only in our books which were determined on this ground. These were all of the character I have stated. *Hoffner v. Clark*, 5 Whart. 545; *Brawn v. Keller*, 43 Pa. St. 104, 82 Am. Dec. 554; *Steelwagon v. Jeffries*, 44 Pa. St. 407. Certainly it may be considered as settled by abundant authority in this court that where there has been a sufficient actual or constructive delivery to the vendee, and he is in possession, the fact that the vendor is employed as a clerk or a servant about the establishment, in a capacity which holds out no *indiciu*m of ownership, does not constitute such a concurrent possession as the law condemns. In such cases it is a question for the jury whether the change of possession has been actual or *bona fide* — not pretended, deceptive and collusive;" citing *McVicker v. May*, 3 Pa. St. 224, 45 Am. Dec. 637; *Forsyth v. Matthews*, 14 Pa. St. 100, 53 Am. Dec. 522; *Hugus v. Robinson*, 24 Pa. St. 9; *Dunlap v. Bournonville*, 26 Pa. St. 72; *Billingsley v. White*, 59 Pa. St. 464. Many cases illustrative are cited in the preceding notes.

case. There are many situations in which the seller's physical proximity to the thing sold may continue although his relation of ownership has ceased. Thus, where a father sold goods to his son, who lived with him, it was said that the law did not

keeping the goods three months, delivered them to the plaintiff to be sold upon commission. *Held*, that the employment of the son by the plaintiff to assist him in his business, under a contract to which the mother was not a party did not indicate that there had been no actual and continued change of possession in the mother as against creditors. *Roberts v. Burr* (Cal., 1898), 54 Pac. R. 849. The seller's possession of hogs when they were levied on does not show a want of immediate and continued change of possession where such possession was as an agister for hire on leased premises different from those upon which the hogs were ranging at the time of the sale. *Henderson v. Hart* (1898), 122 Cal. 332, 54 Pac. R. 1110. The vendors were a company of F. The goods were in a branch store in C., distant about one hundred and fifty miles. The bill of sale was made at F., June 18th. to B. & M. The next day B. & M. took possession by telephoning one Mahoney to go over to the sales-room in C. and take possession and act as custodian for B. & M. Mahoney did so, being introduced to L., the salesman then in charge, by the secretary of the vendor company, who informed L. that the stock had been sold to B. & M. and that Mahoney was custodian for B. & M. Mahoney remained five or ten minutes looking about, and then went away, returning in the afternoon and remaining for an equal period. Next day Munson returned to C. and was

directed by B. & M. to take charge and act as custodian for them. He went to L., informing L. of his authority from B. & M., of the sale to B. & M., etc., and requested L. to act as salesman under him, to take an immediate inventory, to open a new set of accounts, to make sales for cash only and account daily for receipts, and to secure the lease of the store-room for the new owners, for rent of which Munson would give checks at the proper time. All this was done. Next day, June 21st, Munson gave L. written statement of all this. L. restamped the stationery, making it "Bass & McDonald." Bank accounts were changed to their proper names under the new arrangement. One employee was discharged and others were re-employed in the name of B. & M. The signs on the store, and also the advertising cards in the store-room, were unchanged. *Held*, a sufficient change of possession as against attaching creditors of the vendor. *Bass v. Pease* (1898), 79 Ill. App. 308. M. purchased in good faith and for an adequate cash consideration a stock of goods from V., and received a bill of sale therefor. M. took immediate possession, bought and sold goods in his own name, employed a former clerk of V., and remained at the store and in full charge of it for two or three weeks until he was taken sick and had to go home, when he employed V. to take charge during his absence. The old sign of V. remained above the door, and an old

require the son to turn his father out of doors in order to make his own possession exclusive;¹ and where property had been transferred from a husband to his wife, the court intimated that it was not necessary that she should separate from him in order to be competent to receive it.² Such situations and relationships may give opportunity for fraud and require closer scrutiny than others, but they are not conclusive.³

§ 967. Question of sufficiency usually for jury.—Whether the change of possession is sufficient under the circumstances

market-wagon with V.'s name upon it was used in the business. The old bill-heads of V. were used, but V.'s name was obliterated and M.'s substituted. M. took a new lease of the store in his own name. During this condition of affairs the sheriff levied upon the stock as property of V. *Held*, that there was a sufficient change of possession, and that M.'s title was good as against attaching creditors of V. *Menken v. Baker* (1899), 40 App. Div. 608, 57 N. Y. Supp. 541. K. in payment of a valid debt sold and conveyed to his wife his farm and cattle thereon, and the deed of conveyance of the land was duly recorded. *Held*, that the record worked a constructive change of the possession of the farm, and that that worked a change of possession of the cattle. *Vote v. Karrick* (1899), 13 Colo. App. 388, 58 Pac. R. 333. The seller gave the buyer a bill of sale of certain cows described as standing in certain stalls in one of the seller's barns; the parties went to these stalls, the cows were pointed out, the price was paid, and the seller said, "I deliver you this stock free from all incumbrance." It was also agreed that the seller should keep the cows for what milk they would give until a certain date unless the buyer sooner sold or removed them.

Held, a sufficient delivery as against attaching creditors. *Goodwin v. Goodwin* (1897), 90 Me. 23, 37 Atl. R. 352. See further *Masters v. Teller*, 7 Okla. 668, 56 Pac. R. 1067; *Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. R. 961.

¹ *McVicker v. May*, 3 Pa. St. 224, 45 Am. Dec. 637.

² *Davis v. Zimmerman*, 40 Mich. 24. (But that there must nevertheless be an actual change of possession, see *McAfee v. Busby*, 69 Iowa, 328, 28 N. W. R. 623; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. R. 857, 41 Am. St. R. 200; *McKee v. Garcelon*, 60 Me. 165, 11 Am. R. 200; *Wheeler v. Sel-den*, 63 Vt. 429, 21 Atl. R. 615, 25 Am. St. R. 771, and cases therein cited.)

³ Thus it is said in *Illinois* (*Warner v. Carlton*, 22 Ill. 415): "There is no doubt that it is a circumstance to be considered on the question of fraud, but undoubtedly may be explained." To same effect: *Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178; *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500; *Morgan v. Miller*, 62 Cal. 492; *Gilligan v. Lord*, 51 Conn. 562; *Greenthal v. Lincoln*, 68 Conn. 384, 36 Atl. R. 813. It may of course also be found to be merely a sham. *Gol-lobler v. Martin*, 33 Kan. 252, 6 Pac. R. 267.

to accomplish the purposes of the law is usually a question of fact for the jury.¹

¹**Question of sufficiency for jury—**

Illustrations.— In *McKibbin v. Martin* (1870), 64 Pa. St. 352, 3 Am. R. 588, two sons who were carrying on a hotel, in which their father lived with them, dissolved their partnership, and sold their interest in the furniture and business to their father. The dissolution of their partnership and the fact of the sale were published in two leading newspapers. The sons continued to live in the house and one of them acted as superintendent. Afterwards the furniture was seized by creditors of the sons. *Held*, that the sufficiency of the change of possession was for the jury to determine. In *Porter v. Bucher*, 98 Cal. 454, 33 Pac. R. 335, plaintiff and her husband lived together on a farm on which husband had filed a declaration of homestead. She owned about one hundred and fifty head of cattle and horses which were kept on this farm, and purchased from her husband about one hundred and thirty tons of hay, which had been raised on the farm and stacked in corrals thereon; these corrals had been used for several years for the purpose of stacking hay in them in summer and feeding it directly from the stack to stock in winter. In the previous year the plaintiff had bought from her husband hay stacked in these corrals and had fed it therefrom. In the present sale, she and he had gone to the stacks, estimated the quantity of hay, agreed on the price, he orally delivered possession, and she made a part payment, closed the gates of the corrals, and later paid the remainder of the price to him. When she left

the farm for a six weeks' visit, she requested one of her former employees to look after the hay for her. There was a custom in that vicinity for stock-owners, when they purchased hay, to take their stock to the stacks and feed the hay directly from the stack. *Held*, that the question whether or not there was an immediate delivery, followed by an actual and continued change of possession, was for the jury. In *Thompson Mfg. Co. v. Smith*, 67 N. H. 409, 29 Atl. R. 405, the vendee examined and accepted the engine, and took with him such parts as were liable to be stolen or lost, such as gauge-cocks, etc. *Held*, that the question whether or not there was a sufficient change of possession was for the jury. In *Tennent-Stribling Shoe Co. v. Rudy* (1893), 53 Mo. App. 196, R., after negotiation with H., made on May 10th an invoice of his stock of goods, and on May 11th made a bill of sale of the stock to H. at the invoice price of \$2,232.69. H. in payment therefor surrendered to R. notes held against him amounting to \$700, and assumed to pay other indebtedness of R. amounting to the remainder of the purchase price. On account of other business H. was unable to take charge of the store in person, but he took his bookkeeper out of his cigar establishment and set him at work in the store, and was himself there frequently from the date of the purchase until the goods were attached, eight days later. Immediately after the sale was completed H. notified the creditors whose debts he had assumed to pay that he had purchased the stock and as-

§ 968. Doubts resolved in favor of creditor or purchaser.

And where the question of the sufficiency is in doubt, the doubt, it is said, ought to be solved in favor of the creditor or

sumed their debts and that he had replenished the stock with new goods. H. afterwards paid these debts. H. retained R.'s clerk in his employ, and neglected to destroy R.'s sign which was painted on the body of the building, and also failed to change the name on the delivery wagon. *Held*, the sufficiency of the change of possession was for the jury. In *Sharpless Bros. v. Derr* (1895), 62 Mo. App. 359; s. c., 1 Mo. App. R. 529, Phil. Derr was indebted to his brother Ed. They went to an attorney and had a bill of sale of the stock in "Derr's Dry Goods Store," of which P. was proprietor, drawn up, and the price agreed on, which price was to apply on P.'s debt to E. P. then returned to the store and informed the clerks of the sale, and in a few minutes E. returned and told the clerks of the sale and hired them to act as his clerks. E. also hired P. to act as his manager. E. remained in the store that day and took charge of affairs, wrote letters to other creditors informing them of his purchase, had notices of the sale published in the several papers of the town (one daily and two weeklies), and he and all others at work in the store announced the sale to all persons coming in. Insurance policies and bank accounts were also changed to E.'s name. No change was made in the sign "Derr's Dry Goods Store," since that was conceived by P. and E. to be correctly descriptive of the new state of affairs. Next day E. returned to his home and left P. in charge as manager. *Held*, that a verdict of actual and continued change

of possession will not be set aside, although the case is on the borderline. In *White v. Pease* (1897), 15 Utah, 170, 49 Pac. R. 416, W. received a bill of sale for a quantity of grain in a locality remote from transportation and from place where W. lived. Whether delivery was made within a reasonable time, when W. drove forty-five miles in order to obtain teams with which to remove the grain, is a question of fact for the jury. In *McGuire v. West* (1897), — Ky. App. —, 43 S. W. R. 458, some hogs had belonged to W.'s employee, who kept them at W.'s logging camp, and allowed them to follow cattle owned and fed by W. W. purchased the hogs of his employee, the latter to be credited on an obligation he owed W. The hogs were to remain at the camp and feed after the cattle awhile before being weighed. During this interval an execution was levied upon them by M. *Held*, that the question of sufficiency of change of possession was one for the jury. In *Brown v. Harmon* (1898), 29 App. Div. 31, 51 N. Y. Supp. 820, the bill of sale was executed by the vendor at a time when he was being pressed by his creditors. It covered all his goods, wares, merchandise and store fixtures, and was delivered to the vendee on Friday evening, and at the same time the vendor, after locking the doors, handed the key to the vendee. Next morning the vendee handed the vendor the key, and told him to go to the store and open it and sell the goods that day, and close the store at night. On that day the vendor sold six or seven dollars' worth of

subsequent purchaser, and against the first purchaser, because it was within the latter's power to make the matter clear.¹

§ 969. **Who are creditors.**—The statute of 13th Elizabeth aimed at the protection of “creditors and others” in “their just and lawful actions, suits, debts, accounts, damages, penalties,” etc., and it becomes material to ascertain who are the “creditors and others” who are protected by this and the various enactments copied after it. And first it may be noticed that, in this as in other respects, the construction which has been put upon these acts is a liberal one, designed to further their beneficent purposes, and has not “stuck in the bark.”

§ 970. — **Nature of demand—Contract or tort—In judgment.**—In respect of the nature of their demands, therefore, it is the settled rule that all those are creditors who have claims enforceable by legal process, whether such claims are based upon express or implied contract, or not.² One entitled to re-

goods. On the next Monday the vendor again went to the store, put some posters in the window, advertising an auction sale of the goods, and boxed up some of the goods which B., the vendee, did not wish to sell. The signs upon the building and the awning were not changed. Vendee was vendor's mother-in-law and lived in his family. *Held*, the question of change of possession was one for the jury, and a directed verdict for the vendee was set aside.

¹ Anderson v. Brenneman (1880), 44 Mich. 198.

² Thus in *Bongard v. Block*, 81 Ill. 186, 25 Am. R. 276, the court say that the word “creditors” is not “used in the strict technical sense, but includes all parties who have demands, accounts, interests or causes of action, for which they might recover any debt, damages, penalty or forfeiture; that such were the interests which the statute expressly says

shall be protected, and therefore all persons having such interests must be included in the word ‘creditors.’” And in *Anderson v. Anderson*, 64 Ala. 403, the court say: “The term *creditors*, as employed by the statute, has been construed liberally, and not in a narrow, strict or technical sense. Whoever has a right, claim or demand founded on contract, whether contingent or absolute, for the performance of a duty, or for the payment of damages if the contract should not be fully performed, has been regarded as a creditor within the meaning of the statute, against whom a voluntary conveyance will not be supported, though no breach of the contract, furnishing a cause of action, may occur until after the execution of the conveyance. *Bibb v. Freeman*, 59 Ala. 612; *Foote v. Cobb*, 18 Ala. 585; *Gannard v. Es-lava*, 20 Ala. 732.”

cover damages for the commission of a tort is no less a creditor than he who is entitled to damages for the breach of contract.¹ Neither is it necessary that the claim, whether in contract or in tort, shall have matured or been in action at the time when the fraudulent transfer was consummated: if the claim existed then it is sufficient,² though it must usually be reduced to judgment before it can be made the actual basis of attack.³

¹ **Claims for the recovery of damages for torts** are, before judgment, necessarily uncertain and unliquidated, but by the weight of authority the claimants are entitled to protection, as creditors, even before suit or judgment, against conveyances intended to defeat them. *Bongard v. Block*, 81 Ill. 186, 25 Am. R. 276; *Walradt v. Brown*, 1 Gilm. (Ill.) 397, 41 Am. Dec. 190; *Greer v. Wright*, 6 Gratt. (Va.) 154, 52 Am. Dec. 111; *Lowry v. Pinson*, 2 Bailey, L. (S. C.) 324, 23 Am. Dec. 140; *Philbrick v. O'Connor*, 15 Oreg. 15, 13 Pac. R. 612, 3 Am. St. R. 139; *Shean v. Shay*, 42 Ind. 375, 13 Am. R. 366.

As long ago as *Twyne's Case*, 3 Coke, 80, it was said that "this act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, etc." That it applies to torts, see also: *Corder v. Williams*, 40 Iowa, 582; *Weir v. Day*, 57 Iowa, 84; *Hoffman v. Junk*, 51 Wis. 613; *Harris v. Harris*, 23 Gratt. (Va.) 737; *Cooke v. Cooke*, 43 Md. 523; *Welde v. Scotten*, 59 Md. 72; *Westmoreland v. Powell*, 59 Ga. 256; *Simons v. Busby*, 119 Ind. 13, 21 N. E. R. 451; *Lyne v. Wann*, 72 Ala. 43; *Cole v. Terrell*, 71 Tex. 549,

9 S. W. R. 668; *McVeigh v. Ritenour*, 40 Ohio St. 107; *Jackson v. Myers*, 18 Johns. (N. Y.) 435. Even before suit brought or judgment obtained. *Shean v. Shay*, *supra*; *Corder v. Williams*, *supra*.

The *dictum* of Judge Cooley in *Hill v. Bowman*, 35 Mich. 191, *contra*, is said to be opposed to the weight of authority, and is weakened if not destroyed by *Schaible v. Ardner*, 98 Mich. 70, 56 N. W. R. 1105. But in Connecticut and Vermont "creditors" are those only whose claims are based upon contract. *Fox v. Hills*, 1 Conn. 294; *Fowler v. Frisbie*, 3 Conn. 320; *Beach v. Boynton*, 26 Vt. 725; *Green v. Adams*, 59 Vt. 602, 59 Am. R. 761, 10 Atl. R. 742.

² **As to torts**, *Shean v. Shay*, 42 Ind. 375, 13 Am. R. 366; *Corder v. Williams*, 40 Iowa, 582. *Contra*, *Hill v. Bowman*, 35 Mich. 191, *dictum*. But see *Schaible v. Ardner*, 98 Mich. 70, 56 N. W. R. 1105.

In case of claims based on contract the right of attack dates from the time of making the contract. *Hamet v. Dundass*, 4 Pa. St. 178; *Howe v. Ward*, 4 Me. 195; *Cook v. Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381; *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec.

³ Unless changed by statute, as in Alabama, the rule is practically universal that before a creditor can commence proceedings to set aside the fraudulent conveyance he must,

by judgment, levy or otherwise, have acquired a lien upon the property involved. Wait on *Fraud. Convey.*, § 73; 2 *Bigelow on Fraud*, 136.

§ 971. — **Absolute or conditional.**— Neither is it necessary that the claim, at the time of the transfer, shall have been an absolute rather than a conditional or collateral one: sureties and indorsers are creditors of their principals and of each other to the extent of their right to contribution or indemnity,¹ while the obligees are creditors not only of the principal debtors but of the indorsers and sureties as well.²

§ 972. **Existing and subsequent creditors — What conveyances existing creditors may avoid.**— In respect of the time when the creditors became such, there can ordinarily be little question concerning those whose claims were in existence at the time of the conveyance alleged to be fraudulent. As to these, who are usually designated “existing creditors,” it seems now to be the generally established rule that, while conveyances with actual fraudulent intent are of course voidable, conveyances merely voluntary, though by some authorities deemed also fraudulent *per se*,³ are to be regarded simply as presump-

104; *Thompson v. Thompson*, 19 Me. 244, 36 Am. Dec. 751; *Woolridge v. Gage*, 68 Ill. 157; *Anderson v. Anderson*, 64 Ala. 403; *Gannard v. Eslava*, 20 Ala. 732.

A claimant in bastardy proceedings is a creditor before judgment, though she cannot attack the conveyance until after judgment has been obtained. *Pierstoff v. Jorges*, 86 Wis. 128, 39 Am. St. R. 881, 56 N. W. R. 735. So where wife in divorce proceedings claims alimony. *Byrnes v. Volz*, 53 Minn. 110, 54 N. W. R. 942.

¹ *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. R. 728; *Pashby v. Mandigo*, 43 Mich. 172, 3 N. W. R. 927; *Rogers v. Abbott*, 128 Mass. 102; *Post v. Stiger*, 29 N. J. Eq. 554; *Shurts v. Howell*, 30 N. J. Eq. 418; *Bibb v. Freeman*, 59 Ala. 612; *Loughridge v. Bowland*, 52 Miss. 546; *Van Wyck v. Seward*, 18 Wend. (N. Y.) 375; *Rynearson v. Turner*, 52 Mich. 7, 17 N. W. R. 219.

² *Cook v. Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381.

³ In the famous case of *Reade v. Livingston* (1818), 3 Johns. (N. Y.) Ch. 481, 8 Am. Dec. 520, Chancellor Kent, after an elaborate review of the English and American cases, reached the conclusion that where the party is indebted at the time of the voluntary conveyance, it is fraudulent as a presumption of law, and that this presumption does not depend upon the amount of the debts, or the extent of the property or the circumstances of the party. This strict rule has since been repudiated in New York (*Seward v. Jackson*, 8 Cow. 406; *Cole v. Tyler*, 65 N. Y. 73; *Dunlap v. Hawkins*, 59 N. Y. 342; *Smith v. Reid* (1892), 134 N. Y. 568, 31 N. E. R. 1082), though it has been followed in a few other cases. *Hanson v. Buckner*, 4 Dana (Ky.), 251, 29 Am. Dec. 401.

tively fraudulent, and may be sustained when, and only when, the parties make clear proof that, notwithstanding the indebtedness of the grantor, the conveyance was made in actual good faith and in such an amount as to leave at the time a reasonable surplus for the satisfaction of creditors.¹

§ 973. — What conveyances subsequent creditors may avoid.—As to the second class, usually called “subsequent creditors,” it seems likewise to be settled that a conveyance made with an actual and direct intent to defraud creditors may be impeached by subsequent as well as by existing ones;² but that conveyances simply voluntary are, at least where no creditors of the first class exist also, neither conclusively nor presumptively fraudulent, but will be deemed so where proof is given of an intention to defraud such subsequent creditors.³

¹ Illustrations of this already appear in previous notes. See also *Kain v. Larkin* (1892), 131 N. Y. 300, 30 N. E. R. 105; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148; *Bull v. Bray*, 89 Cal. 286, 26 Pac. R. 873, 13 L. R. A. 576; *Cook v. Johnson*, 1 Beas. (N. J. Eq.) 51, 72 Am. Dec. 381.

² *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. R. 532; *Day v. Cooley*, 118 Mass. 524; *Bassett v. McKenna*, 52 Conn. 437; *Wyman v. Brown*, 50 Me. 139; *Lowry v. Fisher*, 2 Bush (Ky.), 70, 92 Am. Dec. 475; *Horbach v. Hill*, 112 U. S. 144.

In *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. R. 946, 14 Am. St. R. 732, it is said, in reference to the right of subsequent creditors to attack, that “the rule has been quite uniform that an actual fraudulent intent to defraud *some* creditor must be proved.” In *Seals v. Robinson*, 75 Ala. 363, it is said that, “if actual fraud is shown, it is not of importance whether it was directed against existing or subsequent creditors; either can successfully impeach and

defeat the conveyance, so far as it breaks in upon the right to satisfaction of their debts. . . . The right of the subsequent creditor depends upon the existence of actual fraud in the transaction; the burden of proving it rests upon him.”

³ In a late case in Arkansas (*Rudy v. Austin* (1892), 56 Ark. 73, 19 S. W. R. 111, 35 Am. St. R. 85) it is said: “Against subsequent creditors a voluntary conveyance executed by a grantor in debt at the time is not void unless actually fraudulent. To make it fraudulent, proof of actual or intentional fraud is required. As to what will be sufficient proof of such fraud, the authorities are obscure and conflicting. In order for a subsequent creditor to avoid a voluntary conveyance it is not sufficient to show that there are ‘debts still outstanding, which the grantor owed at the time he made it,’ as held in *Toney v. McGehee*, 38 Ark. 427. Mere indebtedness is no evidence of fraud as to such creditors. But the insolvency of the grantor at the time

§ 974. — Where creditors of both classes.— Where creditors of both classes exist — that is, where there are creditors at the time of the conveyance, and afterwards, before their debts are paid, other debts to other persons are created — the author-

of the conveyance is at least *prima facie* evidence of a fraudulent intent as to them, 'because a transfer of property under such circumstances affords a reasonable ground of presumption that the intention with which it was made was to put beyond the reach of creditors, future as well as present, the property to which they had a right to resort for the payment of their debts.' This presumption would necessarily arise if the grantor contracted debts immediately or so soon thereafter as to show that he reasonably had in contemplation the contracting of such debts at the time the transfer was made. From his inability to pay and the voluntary alienation, the conclusion would naturally follow that he did not intend to pay such debts when they were contracted, and that the conveyance of the property was intended to delay or prevent the collection thereof under due process of law. *Winchester v. Charter*, 12 Allen (Mass.), 606; s. c., 97 Mass. 140; *Morrill v. Kilner*, 113 Ill. 318, 322; *Moritz v. Hoffman*, 35 Ill. 553; *Taylor v. Coenen*, L. R. 1 Ch. Div. 636, 641; *Reade v. Livingston*, 3 Johns. Ch. 501, 502, 8 Am. Dec. 520; *Redfield v. Buck*, 35 Conn. 328, 337, 95 Am. Dec. 241; *Ridgeway v. Underwood*, 4 Wash. C. C. 129; *Howe v. Ward*, 4 Greenl. (Me.) 195, 206; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229, 252; *Horn v. Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Bump, Fr. Conv.* 322; 2 *Bigelow, Fraud*, 99, 181, 200; *May, Fr. Conv.* 75; 1 *Am. Lead. Cas.* (5th ed.) 42; 2 *Pomeroy, Eq. Jur.*, § 973."

"In an action brought by, or for the benefit of, subsequent creditors, the complaint should aver that the instrument to be avoided was executed with intent to defraud subsequent as well as existing creditors. *Barrow v. Barrow*, 108 Ind. 345, 9 N. E. R. 371; *Stumph v. Bruner*, 89 Ind. 556; *Stevens v. Works*, 81 Ind. 445; *Lynch v. Raleigh*, 3 Ind. 273." *Hutchinson v. First Nat. Bank*, 133 Ind. 271, 36 Am. St. R. 537, 30 N. E. R. 952.

Where a man voluntarily conveys the greater part of his property to his wife, so that she and the children would have a home no matter "what turned up," and soon thereafter incurred debts and became insolvent, the conveyance was held to be a fraud upon the subsequent creditors. *Jackson v. Plyler*, 38 S. C. 496, 37 Am. St. R. 782, 17 S. E. R. 255.

Voluntary conveyance in view of grantor's future indebtedness, and with an intent to place his property beyond the reach of his creditors, is fraudulent as against them and will be set aside. *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594; *Black v. Nease*, 37 Pa. St. 433; *Case v. Phelps*, 39 N. Y. 164.

The fact that the grantor enters into a hazardous business, or engages in a speculative enterprise, at or soon after the execution of a voluntary conveyance, is strong evidence of fraud upon subsequent creditors. *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. R. 946, 14 Am. St. R. 732; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158; *Beeckman v. Montgomery*,

ities are more in conflict. The English and some American cases declare that if the conveyance is voidable by such existing creditors, it may, in virtue of their right to avoid it, be successfully attacked by such subsequent creditors, even though otherwise the latter could not assail it;¹ but other, and perhaps

14 N. J. Eq. 106, 80 Am. Dec. 229; Mullen v. Wilson, 44 Pa. St. 413, 84 Am. Dec. 461; Carr v. Breese, 81 N. Y. 584.

It may, however, be rebutted. Hagerman v. Buchanan, *supra*.

That conveyance made with intent to defeat subsequent creditors is voidable as to them, see also Laughton v. Harden, 68 Mo. 208; Rose v. Brown, 11 W. Va. 122; Shand v. Hanley, 71 N. Y. 319; Wallace v. Penfield, 106 U. S. 260, 1 S. Ct. 216; Payne v. Stanton, 59 Mo. 158.

¹ Among the English cases see Jenkyn v. Vaughan, 3 Drew. 419; Freeman v. Pope, L. R. 5 Ch. App. 538.

Among the American cases see Toney v. McGehee, 38 Ark. 419, where it is said: "A voluntary conveyance may be impeached by a subsequent creditor on the ground that it was made in fraud of existing creditors; but to do so he must show either that actual fraud was intended, or that there were debts still outstanding which the grantor owed at the time he made it" [citing 1 Story's Eq. Juris., § 361; Claflin v. Mess, 30 N. J. Eq. 211; Pope v. Wilson, 7 Ala. 690; Smith v. Greer, 3 Humph. 118; Reade v. Livingston, 3 Johns. Ch. 480, 8 Am. Dec. 520], though the latter part of the rule seemed to be denied in the later case of Rudy v. Austin, 56 Ark. 73, 35 Am. St. R. 85, 19 S. W. R. 111.

But in the still later case of May v. State Nat. Bank, 59 Ark. 614, 28 S. W. R. 431, it is said that under the statute in Arkansas "a voluntary

conveyance made with an actual intent to cheat, hinder or defraud either existing or subsequent creditors is void as to creditors both prior and subsequent."

In Claflin v. Mess, 30 N. J. Eq. 211, it is said: "A subsequent creditor may also impeach a voluntary deed, simply on the ground that it was made with intent to defraud existing creditors. 1 Am. Lead. Cas. 40; 1 Story's Eq. Juris., § 361; King v. Wilcox, 11 Paige, 594. But in such a case, in order to establish a good title to relief, he must show that *at the time of the commencement of his suit* there were debts still outstanding which the grantor owed at the time he made the deed, otherwise no foundation is laid for avoiding it as a fraud upon antecedent creditors; for if the grantor has paid all his debts incurred prior to the conveyance, that fact fully repels all idea of fraud as to them. Hurd on Fraud. Con. 52; 1 Am. Lead. Cas. 41; Spirett v. Willows, 3 De G., J. & S. 292; Freeman v. Pope, L. R. 9 Eq. 205, 5 Ch. App. 536; Lush v. Wilkinson, 5 Ves. 387; Kidney v. Consomäher, 12 Ves. 156." But see Gardner v. Kleinke, 46 N. J. Eq. 90, 18 Atl. R. 457. The requirement of prior debts still existing at the time of suit, instead of at the time of contracting the later debts, seems to be repudiated in later English cases. Taylor v. Coenen, 1 Ch. D. 636; Ex parte Russell, 19 Ch. D. 588. See also Redfield v. Buck, 35 Conn. 328; McLane v. Johnson, 43 Vt.

the majority, of the more recent American cases deny, in the language of one of them, "that one class of creditors may avoid a conveyance merely on the ground that it was intended to, and if sustained will, defraud another class."¹

§ 975. — Subrogation of subsequent to rights of existing creditors.— If the conveyance is avoided by the existing creditors it is said to be the rule that the subsequent creditors are

48. The section quoted from Story's Eq. Juris. (§ 361) can scarcely be deemed to support the views for which it is cited, and it is at least probable that the court in such cases as *Claffin v. Mess*, *supra*, meant no more than to declare the rule already noticed in the text, that a conveyance made with an express intention to defraud creditors could be assailed by the subsequent as well as by the existing creditors.

In *Hutchinson v. Kelly* (1842), 1 Rob. (Va.) 123, 39 Am. Dec. 250, it is said to be "the fair conclusion from the current of decisions" "to admit subsequent creditors to relief against a fund fraudulently alienated where the conveyance has been or might be successfully impeached by prior creditors."

In *Clark v. French* (1843), 23 Me. 221, 39 Am. Dec. 618, a distinction is made between those cases in which the conveyance is made for a valuable consideration but with fraudulent intent, and those in which the conveyance is simply voluntary or subject to a secret trust and confidence. In the former it is not, while in the latter it is, subject to defeat by subsequent creditors.

¹*Fullington v. Northwestern, etc. Association*, 48 Minn. 490, 51 N. W. R. 475, 31 Am. St. R. 663, where the court said: "The plaintiff is a subsequent creditor, so that the question is presented, Can a subsequent cred-

itor avoid a conveyance by his debtor, not intended to nor operating to defraud him, on the ground that it was executed with intent to defraud existing creditors? This court has always held he cannot. *Bruggerman v. Hoerr*, 7 Minn. 337, 82 Am. Dec. 97; *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104; *Sanders v. Chandler*, 26 Minn. 273, 3 N. W. R. 351; *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. R. 815; *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. R. 243, 45 N. W. R. 715. One expression in *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. R. 831, may point to a different conclusion, but the entire opinion is to the effect that to enable a subsequent creditor to avoid a transfer as fraudulent, it must appear that its purpose was, or that its effect will be, to defraud him. An intent to defraud existing creditors may, in connection with other circumstances, be evidence on the question of intent to defraud subsequent or prospective creditors. *Union Nat. Bank v. Pray*, 44 Minn. 168, 46 N. W. R. 304. There is no little confusion in the authorities on the point, there being many *dicta* to the effect, and some decisions directly holding, that a subsequent creditor may avoid a conveyance fraudulent as to existing creditors, and other decisions — the majority of the more modern decisions — holding the contrary."

entitled to the benefit and will share *pro rata* with the existing creditors;¹ but this can be true only where, as in bankruptcy or insolvency proceedings, a court of equity is making a general distribution of the assets, and cannot operate to prevent the diligent creditor who has secured a lien by levy or otherwise from retaining the priority he has acquired by his diligence.²

§ 976. — **Creditors with notice.**— If the subsequent creditor became such with notice of the conveyance alleged to be fraudulent, and was therefore not deceived by the apparent condition of things, he cannot ordinarily complain.³

§ 977. **Bona fide purchasers from fraudulent vendee.**— It has been already seen that one who purchases in good faith and for a valuable consideration is not affected by the fraudulent intention of his grantors.⁴ And even though the original vendee may have participated in the fraudulent intention of his vendor, yet if such vendee pledges, mortgages or conveys to another who takes in good faith and for value, the latter will be protected against the creditors or subsequent vendees of the original vendor.⁵

¹ Thus in *Kehr v. Smith*, 20 Wall. (U. S.) 36, it is said: "It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata*," citing, among others, *Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733; *Robinson v. Stewart*, 10 N. Y. 189; *Thompson v. Dougherty*, 12 Serg. & R. (Pa.) 448; *Henderson v. Hoke*, 3 Dev. (N. C.) L. 12; *Kissam v. Edmundson*, 1 Ired. (N. C.) Eq. 180; *Read v. Livingston*, 3 Johns. (N. Y.) Ch. 481, 8 Am. Dec. 520; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229, 1 Am. Lead. Cas. 17. See also *O'Brien v. Stambach*, 101 Iowa, 40, 65 N. W. R. 1133.

² See *Wait on Fraudulent Conveyances* (3d ed.), § 392, and cases cited.

³ *Monroe v. Smith* (1875), 79 Pa. St. 459; *Kane v. Roberts* (1874), 40 Md. 590; *Lehmberg v. Biberstein* (1879), 51 Tex. 457; *Sledge v. Obenchain* (1881), 58 Miss. 670.

⁴ See *ante*, § 952.

⁵ *Hood v. Fahnestock*, 8 Watts (Pa.), 489, 34 Am. Dec. 489; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126; *Sydnor v. Roberts*, 13 Tex. 598, 65 Am. Dec. 84; *Danbury v. Robinson*, 1 McCarter (N. J.), 213, 82 Am. Dec. 244; *Herndon v. Kimball*, 7 Ga. 432, 50 Am. Dec. 406; *Young v. Lathrop*, 67 N. C. 63, 12 Am. R. 603; *McLeod v. O'Neill* (Ky.), 22 S. W. R. 220.

§ 978. Fraudulent conveyance not good as security for amount paid upon it.—Where a conveyance is set aside as fraudulent in fact it is so *ab initio* and *in toto*. It cannot therefore be permitted to stand as security for the sums which the fraudulent grantee may have paid in consideration of it. "It is fit and proper that this result should take place," said Chancellor Kent in an early case, "as a contrary course might afford countenance to fraud by giving it a partial effect. It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat."¹ Where, however, the conveyance is only constructively fraudulent as to creditors, it may be permitted to stand as security for the purpose of reimbursing an innocent purchaser for the money advanced by him.²

V.

OF FRAUD UPON SUBSEQUENT PURCHASERS.

§ 979. In general.—Closely, if not inseparably, associated with the question of fraud upon creditors is, as has been already noticed, the question of fraud upon subsequent purchasers; and many of the cases in treating of the matter lay down rules as equally applicable to both. In the preceding subdivision, however, the considerations arising when the claims of creditors were involved have so greatly overshadowed the matter of the rights of subsequent purchasers from the vendor, that, for emphasis at least, a separate reference to the subject seems desirable. There are, also, aspects in which the two questions are not precisely identical.

§ 980. Delivery as a requisite to the transfer of title.—It has been seen in a previous chapter³ that, as a general rule,

¹Sands v. Codwise (1808), 4 Johns. 109; Lyons v. Leahy, 15 Oreg. 8, 3 (N. Y.) 536, 4 Am. Dec. 305. To same effect: Bean v. Smith, 2 Mason (U. S. C. C.), 252; Beidler v. Crane, 135 Ill. 92, 25 Am. St. R. 349, 25 N. E. R. 655 (citing Lobstein v. Lehn, 120 Ill. 549, 12 N. E. R. 68; Phelps v. Curts, 80 Ill. 109); Lysons v. Leahy, 15 Oreg. 8, 3 Am. St. R. 133, 13 Pac. R. 643; Liv-
esay v. Beard, 22 W. Va. 585; Hen-
derson v. Hunton, 26 Gratt. (Va.) 926.
²Philbrick v. O'Connor, 15 Oreg. 15, 3 Am. St. R. 139, 13 Pac. R. 612.
³See ante, § 483 et seq.

whenever parties have agreed upon the present transfer of the title to a specific chattel in a deliverable condition, and nothing remains to be done by either party which the parties have evidently deemed a condition precedent, the title does pass at once, in pursuance of their agreement, although the goods are, in fact, neither delivered nor paid for. In accordance with this rule, delivery is not a prerequisite to the transfer of the title; and this seems to be the true and natural rule.

§ 981. —. Indications, however, have not been wanting of a contrary view. Thus, as has been seen,¹ it has been suggested by some courts that if the purchaser of goods permits them to remain in the possession of the seller, he so clothes the latter with the apparent *indicia* of ownership that he should be estopped to assert his title against a subsequent purchaser who buys the goods from the vendor relying in good faith upon the latter's apparent ownership. It has been said in other cases² that while delivery might not be necessary to pass the title as between the parties, still "that delivery of possession is necessary to the conveyance of a title to personal chattels,

¹ See *ante*, § 167.

² Upon this point the case of *Lanfear v. Sumner* (1821), 17 Mass. 110, 9 Am. Dec. 119, so often discussed and criticised, is the leading one. The court there said: "The general rule is perfectly well established that the delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. When the same goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other. This principle is recognized in the case of *Lamb v. Durant*, 12 Mass. 54 [7 Am. Dec. 31], and in *Caldwell v. Ball*, 1 T. R. 205 [1 Rev. Rep. 187]. The latter, indeed, was a case not of actual delivery of goods to either party,

but of delivery of the bill of lading. There were two bills of lading, signed at different times by the master of the ship, and the party who first obtained one of them by a legal title from the owner of the goods was held to have the best right, although the bill of lading under which he claimed was made the last. The indorsement and delivery of the bill of lading in such a case is equivalent to the actual delivery of the goods. This is also the rule of the civil law. When the same thing is sold to two different persons, '*manifesti juris est, cum, cui priori traditum est, in detinendo dominio esse potiolem.*'" Cod. 3, 32, 15.

The quotation in the text is made from *Crawford v. Forristall* (1877), 58 N. H. 114, citing *Ricker v. Cross*,

as against every one except the vendor; and a subsequent purchaser with no notice of a prior sale, receiving possession, has a better title than one who has before purchased the same thing with no delivery of possession."

§ 982. — **Reasons for the rule.**—Various reasons for this rule have been assigned. In an early case¹ in Illinois the court said: "Possession of personal property has always been re-

5 N. H. 570; *Shumway v. Rutter*, 7 Pick. (Mass.) 56; *Jewett v. Warren*, 12 Mass. 300; *Lanfear v. Sumner*, *supra*.

In *Cummings v. Gilman* (1897), 90 Me. 524, 38 Atl. R. 538, it is said: "Although the general rule is that, as between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery (when no question arises in relation to the statute of frauds), nevertheless the same rule does not operate against subsequent *bona fide* purchasers, attaching creditors without notice, and others standing in like relation. To render a sale valid against these there must be delivery of the property sold. *Ludwig v. Fuller*, 17 Me. 162; *Vining v. Gilbreth*, 39 Me. 496; *McKee v. Garcelon*, 60 Me. 165. When, therefore, the same goods are sold to two different purchasers by conveyances equally valid, it is well settled that he who first lawfully acquires the possession will hold them against the other. *Lanfear v. Sumner*, 17 Mass. 110; *Jewett v. Lincoln*, 14 Me. 116; *Brown v. Pierce*, 97 Mass. 46, 48."

The same rule is stated and the same cases cited in *Winslow v. Leonard* (1854), 24 Pa. St. 14; and in *Stephens v. Gifford* (1890), 137 Pa. St. 219, 20 Atl. R. 542, 21 Am. St. R. 868,

it is said: "If the owner of goods sells them to A, but retains the possession and afterwards sells them to B, an innocent purchaser, who takes possession, the title of A is gone. It is of no consequence that he acted in good faith and paid a fair price, nor that his reasons for leaving the goods with his vendor were such as grew out of his confidence in or desire to aid him. The fact that the goods were left in the hands of their former owner, with nothing to indicate that his relation towards them was changed, put it in his power to sell them again for a full price to an innocent purchaser. When he makes such sale, one of the purchasers must lose the money he has paid. Assuming that both are alike honest, on which of them ought the loss to fall? Clearly, on him whose act or omission has made or contributed to make the loss possible."

To like effect: *Burnell v. Robertson* (1848), 10 Ill. 282; *Walker v. Collier* (1865), 37 Ill. 362; *Gradle v. Kern* (1884), 109 Ill. 557; *Huschle v. Morris* (1890), 131 Ill. 587, 23 N. E. R. 643; *Cole v. Bryant* (1895), 73 Miss. 297, 18 S. R. 655; *North Pacific Lumbering Co. v. Kerron* (1892), 5 Wash. 214, 31 Pac. R. 595.

¹ *Burnell v. Robertson* (1848), 10 Ill. 282. See also *Walker v. Collier* (1865),

garded as evidence of ownership, and public policy requires that while personal chattels remain in the possession of the former owner they should, as to third persons, be regarded as his." In a Connecticut case¹ it was said to be adhered to "because it has been thought better to take away the temptation to practice fraud than to incur the danger arising from the facility with which testimony may be manufactured to show that a sale was honest." In the Illinois case² above referred to, and in a later Pennsylvania case,³ it is said to be in furtherance of the general principle of the law that where one of two innocent persons must suffer the loss should fall "on him whose act or omission has made, or contributed to make, the loss possible."

These cases clearly regard the rule as a general principle of law regardless of the motives of the parties.

§ 983. Retention of possession by seller as badge of fraud.

Usually, however, the rule has been put upon the ground of actual or constructive fraud; aided, of course, in many States by the express language of the statutes. But, as in the case of the similar question where creditors are involved, while the retention of the possession by the seller would raise some presumption in favor of the subsequent *bona fide* purchaser, the courts are not agreed as to the conclusive character of that presumption.

§ 984. — **Conclusiveness of the presumption.**— In some States the presumption of fraud is held to be conclusive. In Connecticut, for example, the court says: "This rule, that the retention of possession of personal property by the vendor is conclusive evidence of a colorable sale, is a rule of policy required for the prevention of fraud, and is to be inflexibly main-

37 Ill. 362; *Gradle v. Kern* (1884), 109 Ill. 557.

² *Burnell v. Robertson*, *supra*.

³ *Stephens v. Gifford* (1890), 137 Pa.

¹ *Kirtland v. Snow*, 20 Conn. 23, 21 St. 219, 20 Atl. R. 542, 21 Am. St. R. 868.

quoted in *Huebler v. Smith* (1892), 62 Conn. 186, 25 Atl. R. 658, 36 Am. St.

R. 337.

tained.”¹ In Pennsylvania also, as has been seen, the rule operates regardless of the motive of the parties.² In most States, perhaps, the presumption is not conclusive, and may be rebutted by evidence of actual good faith.³ In this respect the question presents substantially the same aspects as where the rights of creditors are involved, discussed in the preceding subdivision.

§ 985. — **Statutory provisions.**—In some States, moreover, it must be remembered, the question of the conclusiveness of the evidence is determined by statute. Thus, for example, in Michigan the statute provides that “every sale made by a vendor, of goods and chattels in his possession or under his control, . . . unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, . . . shall be presumed to be fraudulent and void as against . . . subsequent purchasers in good faith, and shall be conclusive evidence of fraud unless it shall be made to appear, on the part of the person claiming under such sale, . . . that the same was made in good faith and without any intent to defraud such . . .

¹ *Hatstat v. Blakeslee*, 41 Conn. 301; *Capron v. Porter*, 43 Conn. 383; *Mead v. Noyes*, 44 Conn. 487; *Huebler v. Smith*, 62 Conn. 186,—though these were all cases involving the rights of creditors.

² *Stephens v. Gifford* (1890), 137 Pa. St. 219, 20 Atl. R. 542, 21 Am. St. R. 868, quoted from in note to § 988, *post*.

³ Thus, in *Hight v. Harris* (1892), 56 Ark. 98, 19 S. W. R. 235, it is said: “Under our decisions the retention of possession by the vender of personal property after sale is not a conclusive presumption of fraud. Whether there was a delivery, within *Shaul v. Harrington* [1891, 54 Ark.

305, 15 S. W. R. 835] was a question of fact.”

As to *Lanfear v. Sumner* (17 Mass. 110), *supra*, the court, in *Shaul v. Harrington*, said: “The application of its doctrine to a different state of facts seems to have introduced over-nice refinements, and caused some apparent, if not real, confusion in the decisions of Massachusetts and other States as to the character of the delivery that must be made to protect the vendee. The authority of that case has been fairly challenged. See 1 *Parsons on Shipping*, p. 84 and note; *Blackburn on Sales*, 327-329; *Hallgarten v. Oldham*, 135 Mass. 1. It cannot control the decision of this case.”

purchasers.”¹ In several of the States the presumption is conclusive.²

§ 986. **What delivery suffices.**—The question of the character of the delivery which shall suffice to save the rights of the first purchaser is substantially the same as that involved in the cases in which creditors are concerned. In a recent case³ in New Hampshire where there had been a sale of the same wagon to two persons, the latter of whom first obtained possession, the court said: “Admitting the good faith of the parties, and that they stand on equal grounds as to notice of each other’s rights, the defendant [the first purchaser] neglected the very obvious duty of taking possession of the property; and the plaintiffs [the second purchasers], finding it in the control of the vendor, should not be made to suffer for the defendant’s neglect. None of the circumstances which the law makes an exception to the rule requiring delivery of possession exist in this case. The property was not bulky nor immovable. It was not at such a distance from the place of the trade [two and a half miles] that the defendant could not, by ordinary diligence, have asserted his title and taken possession before the plaintiffs. Under such circumstances the plaintiffs’ title is the better one.”

§ 987. — **Illustrations.**—As indicating what are the circumstances which will excuse a delivery, the following, taken from an earlier New Hampshire case⁴ cited in the one last quoted from, will be instructive: “The general rule is that the delivery of possession is necessary in a conveyance of personal

¹ Comp. Laws 1897, § 9520.

So also, in effect, **Arizona**, Rev. Stat. 1887, § 2034; **Indiana**, Rev. Stat. 1897, § 6945; **Kansas**, Gen. Stats. 1897, ch. 112, § 3; **Minnesota**, Gen. Stats. 1894, § 4219; **New York**, Rev. Stats. 1896, part II, ch. 7, title 2, § 5; **Oregon**, Ann. Laws 1892, ch. 8, title 7, § 776; **Wisconsin**, Stats. 1898, § 2310.

² In **California**, Civ. Code, § 3440;

Colorado, Gen. Stats., ch. 43, § 14; **Kentucky**, Stats. 1894, § 1908; **Missouri**, Stats. 1899, § 3410; **Nevada**, Gen. Stats. 1885, § 2633; **Oklahoma**, Stats. 1893, § 2663; **Utah**, Rev. Stats. 1898, § 2473.

³ *Crawford v. Forristall* (1877), 58 N. H. 114.

⁴ *Ricker v. Cross* (1832), 5 N. H. 570,

22 Am. Dec. 480.

chattels as against every one except the vendor. But between the vendor and the vendee the property will pass without delivery; but not with respect to third persons who may afterwards, without notice, acquire a title to the goods under the vendor.¹ An actual delivery by the vendor to the vendee is not in all cases necessary. It is enough if the delivery be such as the situation of the property admits. Thus, where the goods sold are in a warehouse, a delivery of the key is sufficient.² And where the goods are so situated as to admit of no delivery, the sale will be valid without any delivery, as in the case of a sale of goods already in the possession of the vendee.³ When the chattels sold are so situated that there can be no delivery at the time of the sale, the case forms an exception to the general rule, and it is sufficient if the vendee, without any gross laches, takes possession and asserts his title in a reasonable time after he has an opportunity to take possession. The sale of a ship and of goods at sea is a common case which comes within this exception. It is well settled that if possession be taken in a reasonable time after their arrival, the vendee is entitled to hold them, even against a creditor of the vendor who had attached them before the vendee could obtain possession."⁴

§ 988. **Further illustrations.**—"When two own a chattel and one has possession," it was further said in the same case, "the other may convey his interest to a third person without delivery, because the possession of him who has it may be reasonably considered as the possession of the vendee after the sale."⁵ And a sale of a ship in a distant port has been held to stand on the same ground as the sale of a ship at sea.⁶ And

¹ Citing *Shumway v. Rutter*, 7 *land Bank v. Stacey*, 4 *Mass.* 661, 3 *Pick. (Mass.)* 56; *Jewett v. Warren*, 12 *Mass.* 300, 7 *Am. Dec.* 74. *Am. Dec.* 253; *Portland Bank v. Stubbs*, 6 *Mass.* 422, 4 *Am. Dec.* 151;

² Citing *Hollingsworth v. Napier*, 3 *Meeker v. Wilson*, 1 *Gall.* 419. *Caines (N. Y.)*, 182, 2 *Am. Dec.* 268. ⁵ Citing *Beaumont v. Crane*, 14

³ Citing *Manton v. Moore*, 7 *T. R.* *Mass.* 400. ⁶ Citing *Putnam v. Dutch*, 8 *Mass.*

⁴ Citing *Wheeler v. Sumner*, 4 *287; Portland Bank v. Stacey, supra.* *Mason*, 183, 1 *Pet. S. C. R.* 449; *Port-* *In Stephens v. Gifford* (1890), 137

we are of opinion that all cases of sales of chattels which are so situated that there can be no delivery at the time of the sale are within the exception to the general rule, whether the chattels be upon the land or upon the water. Negligence on the

Pa. St. 219, 20 Atl. R. 542, 21 Am. St. R. 868, the court said: "It is, as we have seen, well settled in this State that it is the duty of the purchaser of personal property to take possession of the goods purchased; but the question remains, What is a sufficient taking of possession to protect the purchaser? This question has been answered in a line of cases which begins with *Eagle v. Eichelberger*, 6 Watts, 29, 31 Am. Dec. 449. In that case this court said that the duty of the purchaser was affected by the nature of the transaction, and that a delivery in accordance with the usages of the trade or business in which the sale was made was a sufficient delivery. In *Hugus v. Robinson*, 24 Pa. St. 9, it was further said that the delivery must be such as usually and naturally attends such a transaction, and that the purchaser taking such possession has fully discharged his duty to the public. *Barr v. Reitz*, 53 Pa. St. 256, presented this question on a new state of facts. The owner of household goods sold them, moved out of the house in which they were, and delivered the keys to the purchaser. We held, on these facts, that the previous visible relation between the owner and his goods was broken. Whether the goods were removed from the house in which the owner remained, or the owner removed from the house in which the goods remained, the visible relation between them was broken, and the public was put on the duty to in-

quire. *McMarlan v. English*, 74 Pa. St. 296, was the case of the sale of a stock of goods in a store, of which possession was taken in bulk. This was held sufficient, and it was said that, in fixing upon the duty of the purchaser, the nature of the property, the relation of the parties to it and to each other must be considered, and the possession taken of the stock must be such as was usual in such cases and consistent with the nature and situation of the goods, looked at in connection with the business for which they were held. In *Evans v. Scott*, 89 Pa. St. 136, it appeared that two brothers lived together in the same house. One owned all the furniture. The other bought a carpet on credit, which was laid in the house. When the credit expired he did not pay for it. The other then went to the seller, paid the price, and had a bill of sale made to himself. This was held to give him a title, and it was said that, in considering the question of possession, his relation to the house and its furniture must be taken into account. The results of these cases were summarized in *Crawford v. Davis*, 99 Pa. St. 576, where it was said that the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of the trade or business, are all to be considered in deciding the sufficiency of the possession taken by the purchaser. This was repeated in *McClure v. Forney*, 107 Pa. St. 414, and

part of the vendee to take possession may invalidate his claim as against creditors or subsequent purchasers without notice; but if there be no laches on the part of the vendee, if he take possession in a reasonable time, his title can in no case be impeached for want of possession."

§ 989. — **By delivery of document.**—In a leading case¹ in Massachusetts the court said: "But the delivery required by the rule in *Lanfear v. Sumner* is delivery in its natural sense, that is, a change of possession." And speaking of the effect of the delivery of a warehouse receipt as a delivery of the goods, where the receipt did not make the goods deliverable to order, the court further said: "It cannot be borne in mind too carefully that the only matter now under discussion is whether there has been a delivery in this sense, or dealings having the legal effect of such delivery, of the goods referred to in the warehouse receipt. Cases which turn on a question of property only, or in which delivery or its equivalent was not essential, whether because the question arose between the parties to the sale or mortgage, or because delivery was not necessary in that jurisdiction to complete the transaction as against third persons, or for any other reason, are not precedents in point. Many such cases will be found which speak of documents as

in *Renninger v. Spatz*, 128 Pa. St. 524, 15 Am. St. R. 692.

"Another line of cases began with *Linton v. Butz*, 7 Pa. St. 89, 47 Am. Dec. 501, in which it was held that the purchaser was not bound to take actual possession, where the vendor was not in possession at the time of the sale. In that case the article sold was in the hands of a bailee, and the delivery of an order on him for it was held to be a sufficient delivery of the article. So goods in the hands of a carrier, or stored in a warehouse, may be delivered by delivery of the bill of lading or the warehouseman's receipt. *Bond v. Bunting*, 28 Pa. St.

210. All these cases recognize the rule, while they qualify it as the circumstances require in order to make its application just. The general rule undoubtedly is that the purchaser of goods must, for the protection of the public, take such possession as is usual and reasonable in view of all the circumstances of his purchase. If he neglects this obvious duty, then, as between himself and subsequent vendees or creditors, he must bear the loss resulting from his neglect."

¹ *Hallgarten v. Oldham* (1883), 135 Mass. 1, 46 Am. R. 433.

symbols of the goods. But that expression will not help us, unless it means that a transfer of the documents has the effect of a delivery of the goods as against an attaching creditor, who would be preferred unless the goods had changed hands." Without deciding whether the result would have been different if the form of the receipt had been such as to include an obligation to deliver to order or to bearer, the court held that the transfer of the receipt did not constitute an actual delivery until the warehouseman had consented to become the purchaser's bailee.

§ 990. — **Seller as bailee of buyer.**— On the other hand, in Arkansas, where retention of possession by the seller is only *prima facie* evidence of fraud, the court distinguishing the cases which "are either from jurisdictions where the fact of retention of possession is conclusive of fraud, or are traceable to the authority of *Lanfear v. Sumner*," which the court refused to follow, said: "An examination of the cases will show that a legal delivery, and not a visible change of possession, is all that is demanded to protect the vendee's title." The court further said: "Constructive delivery being enough to satisfy the law, it is an easy transition to constitute the vendor a bailee for the vendee, and so work out a delivery. And it is held that such a delivery is sufficient against creditors. Whenever there is a completed contract of sale and an agreement by the vendor to hold as bailee for the vendee in lieu of an actual delivery, the sale is complete against creditors if it is not otherwise fraudulent."¹

§ 991. — This was, it is true, a case involving the rights of creditors, but in a later case, involving the rights of two conflicting purchasers of the same chattel, this rule was applied, and it was held that if, at the time of the sale to the first purchaser, it was understood that the chattel was then delivered, but was permitted to remain in the possession of the seller as bailee for the first purchaser, this was sufficient to protect his title

¹ *Shaul v. Harrington* (1891), 54 Ark. 305, 15 S. W. R. 835.

against the claim of a subsequent purchaser who bought the same chattel from the vendor so holding as bailee.¹

§ 992. Who are purchasers.—The subsequent purchaser whom the law protects, in the cases now under consideration, is one who, in good faith, by negotiation, acquires interests in or liens upon the property for some valuable consideration then parted with and in ignorance of any outstanding claims or titles. One acquiring title by operation of law through his own wrong, as, for example, the defendant in an action of trover who pays the judgment, would not be protected. In such a case² it was said that the words “subsequent purchaser” “mean one who becomes the buyer of the goods by contract by the mutual assent of the parties express or implied; who of his own desire negotiates for them and pays a price agreed upon, and receives a transfer of them from one who of his own will sells and delivers them; and that they do not mean a wrongdoer upon the property, who against his will is cast in judgment for the value of it and takes title unwillingly by operation of law upon payment of the judgment.”

¹ *Hight v. Harris* (1892), 56 Ark. 98, 19 S. W. R. 235. See also *Hagins v. Combs*, 102 Ky. 165, 43 S. W. R. 222. And in several other cases it has been held that where the best delivery practicable under the circumstances has taken place, it suffices as against a subsequent purchaser, even though the article is then left with the seller as bailee for the purchaser. See *ante*, § 984, note; *Thorn-dike v. Bath* (1873), 114 Mass. 116, 19 Am. R. 318; *Ropes v. Allen* (1866), 11 Allen (Mass.), 591.

² *Marsden v. Cornell*, 62 N. Y. 215.

CHAPTER VII.

OF AVOIDANCE OF THE CONTRACT FOR ILLEGALITY.

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| <p>§ 993. In general.</p> <p>994. General principles of law applicable.</p> <p>995. Courts will not enforce illegal contract.</p> <p>996. — Executory and executed.</p> <p>997. — Reasons.</p> <p>998. Law will not compel rescission.</p> <p>999. — Withdrawal from incomplete contract.</p> <p>1000-1002. — Rescission where parties not <i>in pari delicto</i>.</p> <p>1003, 1004. Agreements partly illegal—Divisible agreements.</p> <p>1005. Forms of the law creating illegality.</p> <p>I. ILLEGALITY AT COMMON LAW.</p> <p>1006. What the common law prohibits.</p> <p>1007. Contract for sale of indecent or immoral thing invalid.</p> <p>1008. — Knowledge presumed.</p> <p>1009. Contract of sale for immoral or illegal purpose.</p> <p>1010. — Seller innocent.</p> <p>1011-1014. — Seller cognizant or participating.</p> <p>1015, 1016. — <i>Malum prohibitum</i> or <i>malum in se</i>.</p> <p>1017-1019. — Degree of participation required.</p> <p>1020-1022. Sales in furtherance of social vices.</p> <p>1023. Sales in furtherance of gambling.</p> <p>1024, 1025. Sales in aid of the public enemy.</p> | <p>§ 1026. Sales in violation of liquor laws.</p> <p>1027-1029. — Conflict of laws.</p> <p>1030-1032. Sales promotive of wagering speculation.</p> <p>1033-1035. — Legitimate speculation.</p> <p>1036. — Form of contract immaterial.</p> <p>1037. — Mere agreement to repurchase unobjectionable.</p> <p>1038. — Or that vendee has option as to quantity.</p> <p>1039. — Effect upon rights of brokers and other agents.</p> <p>1040. Sales in furtherance of unlawful combinations.</p> <p>1041. Sales designed to impose upon the public.</p> <p>1042. Sales of public office.</p> <p>1043. <i>Lex loci</i>.</p> <p>II. INVALIDITY BY STATUTE.</p> <p>1044, 1045. What enactments render sale void.</p> <p>1046, 1047. — Further of construction.</p> <p>1048. — Repeal of statute.</p> <p>1049-1051. — Illustrations of effect.</p> <p>1052. Sunday sales — Statutes forbidding.</p> <p>1053-1056. — Their effect.</p> <p>1057. — Ratification of Sunday sales.</p> <p>1058. — Consideration required.</p> <p>1059. — Conflict of laws.</p> |
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§ 993. **In general.**—The right or power to avoid the contract of sale may also be claimed because such contract was illegal. The question may arise under an almost infinite variety of circumstances, but the particular ground of the objection will ordinarily be either that the subject-matter of the sale is a thing not lawful to be sold, or that the purpose to be effected by the sale is one which the law does not countenance or permit, or that the contract was made at a time or place or under circumstances which the law forbids. The unlawful knowledge or purpose may have been confined to one of the parties only or may have been shared in by both. The forbidden incidents or circumstances attending the sale may have attached to the situation or performance of one party only or may have extended to that of both. The question of illegality may have arisen before the contract had been executed by either, or not until one or both had performed it. The alleged infirmity may attach to the whole contract or to a part of it only. Finally, the law which is violated or which gives rise to the alleged infirmity may be either an express statutory enactment or some rule or maxim of the common law.

§ 994. **General principles of law applicable.**—The fundamental principle which lies at the foundation of the whole subject is that the law will not lend its aid to parties who seek to accomplish that which the letter or the spirit of the law forbids. The law will at least remain passive. It may, of course, in many cases, do more: it may take active steps to avoid or punish the unlawful act, but when the parties themselves apply to it for aid it will withhold its hand. And not only may it withhold its aid from parties who are seeking to *enforce* illegal dealings, but it may also refuse to assist one or both of the parties in *undoing* the unlawful act.

Following out these principles into more specific statement —

§ 995. **Courts will not enforce illegal contract.**—It may be said to be the general principle of the law that the courts will not lend their aid to enforce an unlawful agreement. As

stated by Lord Mansfield in a leading case,¹ "The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for, where both are *equally* in fault, *potior est conditio defendentis*."

§ 996. — **Executory or executed.**— While, therefore, the contract remains wholly executory, neither party having performed on his part, its illegality is a sufficient bar to prevent its enforcement by either party.² If it has been performed by one party but not by the other, the former cannot compel the latter to perform his stipulated portion; for here again the illegality of the undertaking prevents the courts from interfering. If the seller, for example, has delivered his goods but has not received his pay, he is helpless, for the law will not

¹ *Holman v. Johnson* (1775), 1 Cowp. 341. In *Scott v. Brown* (1892), 2 Q. B. 724, Lindley, L. J., said: "*Ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offenses. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegal-

ity. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson*."

² *Materne v. Horwitz*, 50 N. Y. Super. Ct. 41; affirmed, 101 N. Y. 469, 5 N. E. Rep. 331; *Skeels v. Phillips*, 54 Ill. 309; *Frost v. Gage*, 3 Allen (Mass.), 560; *Miller v. Ammon*, 145 U. S. 421; *Church v. Proctor*, 66 Fed. R. 240, 13 C. C. A. 426.

compel payment. If the buyer has paid the price but has not received the goods, he also is helpless, for the law will not compel delivery. In either case, *potior est conditio defendentis*.¹ The law helps neither party, but it leaves them where they have put themselves. It may happen that this course may permit one party to defraud the other, but it is the result of the latter's own folly and misconduct and not the act of the law.

§ 997. — **Reasons.**— It is not from any tenderness for the defendant that this result is permitted but from regard for the law. As was said by Lord Mansfield in the case² already referred to, "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff — by accident, if I may so say."

§ 998. **Law will not compel rescission.**— The policy of the law being to refuse its aid to those who have sought to violate it, it does so not only when the parties are seeking to enforce their illegal contracts, but also when they are seeking to escape them. It will not, therefore, as a general rule, aid either party in his efforts to regain his former position. If, therefore, the seller has delivered the goods but has not received his pay, he not only cannot collect the price, but he cannot, as a rule, regain his goods.³ If the buyer has paid his money before he received the goods, he can, in general, recover neither the goods nor his money.⁴ And if the goods have been delivered and the money paid, neither, as a rule, can tender back what he received and regain that which he has parted with.⁵ In these cases, also,

¹ Bugg v. Towner, 41 Ga. 315; Tompkins v. Compton, 93 Ga. 520, 21 S. E. R. 79; Storz v. Finkelstein, 46 Neb. 577, 65 N. W. R. 195; Rocco v. Frapoli, 50 Neb. 665, 70 N. W. R. 236.

² Holman v. Johnson, *supra*.

³ See *post*, § 1054; Thompson v. Williams, 58 N. H. 248.

⁴ See *post*, § 1054; Thompson v. Williams, *supra*.

⁵ Block v. McMurry, 56 Miss. 217, 31 Am. R. 357; Myers v. Meinrath, 101

the law leaves the parties where they have placed themselves. Here again, usually, *potior est conditio defendentis*; not from regard for him any more than in the cases previously mentioned, but from regard for the policy of the law.

§ 999. — **Withdrawal from incomplete contract — Loccus pœnitentiæ.**— A case, sometimes spoken of as an exception to the rule that neither party can disaffirm, but which is really a case excluded from its operation, is that in which a party who has contemplated an unlawful contract and taken some step looking toward its execution repents himself before the contract has been performed, and disavows his unlawful purpose. He may, in such a case, recover what he has deposited or parted with in anticipation of such performance. Said Mellish, L. J., in the leading case¹ upon the subject: "If money

Mass. 366, 3 Am. R. 368. These were cases of Sunday contracts, but the principle is the same.

¹Taylor v. Bowers (1876), 1 Q. B. Div. 291, C. A. Here the plaintiff had transferred goods to a friend with intent to defraud his creditors. While nothing further in execution of that scheme had been done, plaintiff sought to repudiate it and get back his goods; it was held that he might do so. (But considerable doubt has been thrown upon Taylor v. Bowers by the remarks of Fry, L. J., in which C. J. Coleridge concurred, in Kearley v. Thomson, 24 Q. B. Div. 742. It has, however, been followed in many American cases cited below.)

In Tyler v. Carlisle (1887), 79 Me. 210, 1 Am. St. R. 301, 9 Atl. R. 356, the court say: "The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not been put in operation."

An illegal contract may be re-

scinded so long as it continues executory, and the money paid under it may be recovered back. Souhegan National Bank v. Wallace (1881), 61 N. H. 24; Peters v. Grim (1892), 149 Pa. St. 163, 34 Am. St. R. 599, 24 Atl. R. 192; Clarke v. Brown, 77 Ga. 606; Spring Co. v. Knowlton, 103 U. S. 49; Bernard v. Taylor, 23 Oreg. 416, 37 Am. St. R. 693, 18 L. R. A. 859, 31 Pac. R. 968 (citing Hastelow v. Jackson, 8 B. & C. 321; Smith v. Bickmore, 4 Taunt. 474; Tappenden v. Randall, 2 Bos. & P. 467; Lowry v. Bourdieu, 2 Doug. 468; Munt v. Stokes, 4 Term R. 561; Utica Ins. Co. v. Kip, 8 Cow. (N. Y.) 20; Merritt v. Millard, 4 Keyes (N. Y.), 208; White v. Franklin Bank, 22 Pick. (Mass.) 181; O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 S. W. R. 527; Stacy v. Foss, 19 Me. 335, 36 Am. Dec. 755); Parkersburg v. Brown, 106 U. S. 487; Bateman v. Robinson, 12 Neb. 508, 11 N. W. R. 736. *Contra*: Knowlton v. Spring Co., 57 N. Y. 518.

is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." And the supreme court of the United States¹ has approved the rule that "a recovery can be had, as for money had and received, when the illegality consists in the contract itself and that contract is not executed; in such case there is a *locus pœnitentiæ*; the *delictum* is incomplete; the contract may be rescinded by either party."

§ 1000. — Rescission where parties not in *pari delicto* — Effect of fraud or duress.— Another case in which the rule denying relief does not apply is that in which the parties, though *in delicto*, are not *in pari delicto*, by reason of the fact that the party seeking relief was induced by the fraud or duress of the other to enter into the contract. Thus, it is said by Lord Ellenborough in a leading English case,² where the parties were respectively a bankrupt and a creditor, and the latter had compelled the other to pay him money in fraud of other creditors: "This is not a case of *par delictum*; it is oppression on one side and submission on the other; it never can be predicated as *par delictum* when one holds the rod and the other bows to it. There was inequality of situation between these parties; one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce." And in another case³ involving the same question it was said by Cockburn,

¹ In *Spring Co. v. Knowlton* (1880), 103 U. S. 49, 26 L. ed. 347.

² *Smith v. Cuff*, 6 M. & Sel. 160. So in *Block v. McMurry*, 56 Miss. 217, 31 Am. R. 357, it is held that if the seller in a Sunday sale is made drunk by the buyer for the purpose of defrauding him, the parties are not *in pari delicto*, and the seller can recover his

horse. See also *Bell v. Campbell*, 123 Mo. 1, 25 S. W. R. 359.

³ *Atkinson v. Denby*, 7 Hurl. & Norm. 934.

But the application of this rule to a case involving the compounding of a felony was denied in *Haynes v. Rudd*, 102 N. Y. 372.

C. J.: "It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit."

§ 1001. —. There are also cases in which public policy is deemed to be best subserved by permitting the less guilty party to withdraw and regain his former position. Thus, it is said, "Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him."¹

¹ *Reynell v. Sprye*, 1 De Gex, M. & G. 660.

In *Lowell v. Boston & L. R. Co.* (1839), 23 Pick. (Mass.) 24, 34 Am. Dec. 33, it is said: "The general rule of law is that where two parties participate in the commission of a criminal act, and one party suffers damage thereby, he is not entitled to indemnity or contribution from the other party. So also is the rule of the civil law. *Nemo ex delicto consequi potest actionem*. The French law is more indulgent, and allows a trespasser who has paid the whole damage to maintain an action for contribution against his co-trespasser. Pothier on Oblig. 282. Whether the latter rule be or be not founded on a wiser policy and more equal justice is a question which we are not called upon to decide. This case, like all others, must be decided by the law as it is, whether it be consonant with sound policy or not.

"Our law, however, does not in every case disallow an action by one wrong-doer against another to recover damages incurred by their

joint offense. The rule is, *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude all parties are deemed equally guilty, and the courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers. This distinction was very fully considered in a case recently decided by this court — *White v. Franklin Bank*, 22 Pick. 181. In that case the plaintiff had deposited in the bank a large sum of money, payable at a future day, in violation of a provision in the Revised Statutes which prohibits any such deposit or loan. Both parties were culpable, but as the defendants

§ 1002. —. And finally, there are still other cases in which relief is granted because the person seeking relief belongs to a class for whose protection the statute declaring the invalidity was enacted. Thus, in a recent case,¹ Fry, L. J., in speaking of the maxim, said: "To that general rule there are undoubtedly several exceptions or apparent exceptions. One of those is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the *delictum* is not *par*, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract."

§ 1003. Agreements partly illegal — Divisible agreements. The illegality connected with the contract may attach to the whole contract or to some portion of it only. In the former case there is, of course, no question that the whole contract is rendered unenforceable; but whether the same result must follow in the latter case depends upon whether the contract is indivisible or is so far divisible that the infected parts can be effectually separated from the uninfected; for it is well settled that in case of an illegality in part only, the valid portions may be enforced provided they can be separated from the invalid. Metcalfe, J., stated the rule in this language: "If any part of an agreement is valid it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the

were deemed the principal offenders, ¹ *Kearley v. Thomson* (1890), 24 Q. B. Div. 742. it was held that the plaintiff was entitled to recover back his deposit."

statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound and be enforced without injustice to the defendant."¹

§ 1004. — **Note for price.**—In the case, therefore, of the sale of a number of articles, part of which were forbidden and the residue were not, if the sale were a sale of the whole for one entire sum, no recovery could be had for any;² but if a distinct price were affixed to each article, then the promise to pay is deemed divisible, and the price for those which might lawfully be sold could be recovered, though there could be no recovery for the others.³

But in the latter case, notwithstanding that a distinct price

¹ In *Rand v. Mather*, 11 Cush. (Mass.) 1, 59 Am. Dec. 131. To same effect: *Handy v. Globe Publishing Co.*, 41 Minn. 188, 16 Am. St. R. 695, 4 L. R. A. 466, 42 N. W. R. 872; *Santa Clara Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. R. 211, 18 Pac. R. 391; *Braith v. Guelick*, 37 Iowa, 212; *Sullivan v. Hergan*, 17 R. I. 109, 9 L. R. A. 110, 20 Atl. R. 232.

² See *Standard Furniture Co. v. Van Alstine* (1900), 22 Wash. 670, 62 Pac. R. 145, and cases cited. On a sale of a stock of goods for a gross sum, including liquors which the seller was not licensed to sell, there can be no recovery. *Ladd v. Dillingham*, 34 Me. 316. If liquors are illegally sold, including the barrels containing them, there can be no recovery for the barrels, although it had been agreed that they might be returned and their price credited; they formed part of the illegal contract and hence there can be no recovery. *Holt v. O'Brien*, 15 Gray (Mass.), 311; *Bligh v. James*, 6 Allen (Mass.), 570. So in case of beer and bottles. *Wirth v. Roche*, 92 Me. 383,

42 Atl. Rep. 794. See also *Stewart v. Thayer* (1897), 168 Mass. 519, 47 N. E. R. 420, 60 Am. St. R. 407.

³ *Clark on Contracts*, 475. But the sale of a stock of goods is not entire and indivisible, though the entire stock is sold at one and the same time, if a separate and distinct price is agreed upon for each article; and in an action brought for the whole sum the plaintiff may amend by striking out the illegal items. *Boyd v. Eaton*, 44 Me. 51, 69 Am. Dec. 83. Same: *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Carleton v. Woods*, 28 N. H. 290. In an action on an account containing legal and illegal items, the latter may be stricken out and a recovery be had upon the former. *Goodwin v. Clark*, 65 Me. 280 [citing *Robinson v. Green*, 3 Metc. (Mass.) 159; *Rundlett v. Weeber*, 3 Gray (Mass.), 263; *Holt v. O'Brien*, 15 Gray, 311; *Bligh v. James*, 6 Allen (Mass.), 570; *Warren v. Chapman*, 105 Mass. 187; *Dunbar v. Johnson*, 108 Mass. 519; *Hall v. Costello*, 48 N. H. 176]; *Chase v. Burkholder*, 18 Pa. St. 48.

had been put on each article, if a note were given for the entire amount no recovery could be had upon the note, for that is "a single and entire promise,"¹ though the plaintiff might still recover for the lawful items upon the original *account* if he were in a situation enabling him thus to sue.²

¹See Clark on Contracts, 473; Wadsworth v. Dunnam (1897), 117 Ala. 661, 23 S. R. 699. Thus in Allen v. Pearce (1890), 84 Ga. 606, 10 S. E. R. 1015, where fifteen tons of guano had been sold and a note given for the price, it was held that, because part of the guano had not been branded as required by law, there could be no recovery *on the note*. In Deering v. Chapman (1843), 22 Me. 488, 39 Am. Dec. 592, it was held that a note given in settlement of account was void where the account included charges for liquor unlawfully sold. To same effect: Coburn v. Odell (1855), 30 N. H. 540 [citing Hinds v. Chamberlain, 6 N. H. 225; Clark v. Ricker, 14 N. H. 44; Shaw v. Spooner, 9 N. H. 197; Carlton v. Witcher, 5 N. H. 196]; Kidder v. Blake (1864), 45 N. H. 530; Cotten v. McKenzie (1880), 57 Miss. 418; Braitch v. Guelick (1873), 37 Iowa, 212; Widoe v. Webb (1870), 20 Ohio St. 431, 5 Am. R. 664 (overruling Doty v. Knox County Bank, 16 Ohio St. 133).

But that the lawful part may be recovered in an action based upon the note was held in Clopton v. Elkin (1873), 49 Miss. 95; Yundt v. Roberts (1819), 5 Serg. & R. (Pa.) 139; Frazier v. Thompson (1841), 2 Watts & Serg. (Pa.) 235 (see also Duchman v. Hagerty (1837), 6 Watts, 65); Hynds v. Hays (1865), 25 Ind. 31; Graves v. Safford (1891), 41 Ill. App. 659.

It is no defense to an action on a note given in part payment of an account that part of the account is for

goods sold in violation of law, if the amount of the items for goods lawfully sold exceeds the amount of the note. Warren v. Chapman (1870), 105 Mass. 87.

²Thus, in Allen v. Pearce, *supra*, it was said that "if the suit had been on an account for so many tons of guano, then the contract would have been severable, and the plaintiff could have recovered for that part of the guano which had been branded, and therefore had a good consideration, while the defendant could have defeated a recovery for that part of the guano which had not been branded, and which made the consideration illegal." And in Cotten v. McKenzie, *supra*, the court say that, "while recovery cannot be had on the security [a note], a recovery may be had, under proper pleadings, on so much of the consideration for which the note was given as without it was recoverable. The illegal note has no effect on the valid dues embraced in it. They are as if the note had not been given." To like effect: Shaw v. Carpenter (1881), 54 Vt. 155, 41 Am. R. 837.

So in Widoe v. Webb, *supra*, where a note had been given for an account made up of lawful and unlawful items, the court said: "With respect to the items of the plaintiff's account which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of the note. For, being utterly

§ 1005. Forms of the law creating or declaring illegality. Passing now from the general rules governing the subject of illegality in the contract, a more specific treatment of the forms of the law operating to create the infirmity and of the manner and extent of their application seems to be desirable.

It is sometimes said that the rule of law which is violated in the contract may be either (1) some rule of the common law, (2) some maxim of public policy, or (3) some express statutory enactment. The first two may be not inappropriately grouped under one head, and the subject may be considered under the two subdivisions: I. Illegality at common law, and II. Illegality by statute.

I.

ILLEGALITY AT COMMON LAW.

§ 1006. What the common law prohibits.—The common law forbids that which is indecent or immoral, as well as that which is in violation of positive law or which is opposed to sound public policy. A consideration or a purpose falling within any of the classes must therefore infect the contract with the taint of illegality. Hence —

§ 1007. Contract for sale of indecent or immoral thing invalid.—A contract for the sale of that which is indecent or immoral in itself is void, and no action for its enforcement can be maintained in the courts. Thus in an action to recover the price of a quantity of pictures sold, it was shown that some of them were immoral and indecent in their character, and Lawrence, J., said: “For prints whose objects are general satire or

void, it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note, which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: ‘It is but a reasonable punishment for including with his just due that which he had no right to take.’”

ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals and for which the plaintiff might have been rendered criminally answerable for a libel.”¹

§ 1008. Knowledge presumed.—In cases of this nature, the actual knowledge or intention of the parties, in respect of the illegal object, is of no consequence. They are presumed to know the law.²

§ 1009. Contract of sale for immoral or illegal purpose.—Where, however, the thing sold is in itself innocent, but may be put to an illegal or immoral purpose, other considerations appear. It may be the intention of the buyer in making the purchase to apply the goods to a purpose which is immoral, illegal or opposed to public policy; and in reference to that intention the seller, at the time of the sale, may be in one of three attitudes: (1) He may be ignorant of it; (2) he may have knowledge of it, but have no desire or intention to participate in or further it; and (3) he may have such knowledge and may make the sale with the direct intention of enabling the buyer to put his wrongful purpose into execution.

§ 1010. — Seller innocent.—In the first case, there can be no question that the seller, being ignorant of the wrongful purpose at the time and remaining so up to the time that he has performed on his part, may recover upon the contract, though the guilty buyer could not enforce it. If, however, before he had performed, the seller learned of the buyer's intention, he might doubtless withdraw from the contract;³ whether he could thereafter enforce it would depend upon the considerations to be next discussed.

¹ *Fores v. Johnes* (1802), 4 Esp. (Eng. N. P.) 97. To same effect, of an indecent book. *Poplett v. Stockdale*, 2 Car. & P. 198; *Stockdale v. Onwhyn*, 7 D. & R. 625, 5 B. & C. 173, 2 C. & P. 163.

² See *Waugh v. Morris*, L. R. 8 Q. B. 202.

³ See *Cowan v. Milbourn*, L. R. 2 Exch. 230.

§ 1011. — Seller cognizant of purpose or participating.— In respect of the second and third cases, there can likewise be no question that where the seller knows of and directly participates in and aids the buyer's wrongful purpose, the contract is illegal as to both and will be enforced at the suit of neither. But whether mere knowledge on the part of the seller that the buyer intends to put the goods to a wrongful purpose is sufficient to invalidate the contract as to him and prevent him from recovering the price of the goods, is a question upon which the authorities are in conflict.

§ 1012. —. It is said to be the modern English rule — departing in this respect from certain of the earlier cases — that the contract is illegal where the seller supplies the goods with knowledge that the buyer is purchasing for the purpose and with the intention of applying them to an illegal use.¹

¹ Mr. Benjamin, in his work on Sale, § 506 (6th Am. ed.), says: "The sale of a thing in itself an innocent and proper article of commerce is void when the vendor sells it knowing that it is intended to be used for an immoral or illegal purpose. In several of the earlier cases something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal purpose or profit by the immoral act. The later decisions overrule this doctrine." The case chiefly relied upon by Mr. Benjamin for the latter statement is *Pearce v. Brooks* (1866), L. R. 1 Exch. 213, but it seems that there may be room for doubt as to whether this is the true effect of this decision. See *post*, § 1021.

Mr. Benjamin gives the following *résumé* of the English cases: "In *Faikney v. Reynous*, 4 Burr. 2069, which came before the king's bench in 1767, a party had paid, at the re-

quest of another, money on a contract which was illegal, and sued for its recovery. Judgment was given for the plaintiff, Lord Mansfield saying: 'One of these two persons has paid money for the other, and on his account, and he gives him his bond to secure the *repayment* of it. This is not prohibited. *He is not concerned in the use which the other makes of the money.*'

"The case was followed, in 1789, by the judges in *Petrie v. Hannay*, 3 T. R. 418, but with evident reluctance, and many expressions of hesitation, especially by Lord Kenyon. Much stress was laid in both decisions upon a supposed distinction between the law applicable to the case of a contract which was *malum in se* and one which was *malum prohibitum*.

"These two cases were repeatedly questioned and disapproved, as will be seen by reference to *Booth v. Hodgson*, 6 T. R. 405; *Aubert v. Maze*, 2 Bos. & P. 371; *Mitchell v. Cock-*

§ 1013. —. By the weight of authority in the United States, however, it is clear that mere knowledge of the buyer's wrongful purpose is not enough to defeat the seller's recovery: there must be something more; something to show that the seller was to actively participate in the illegal transaction, or

burne, 2 H. Bl. 379; Webb v. Brooke, 3 Taunt. 6, and Langton v. Hughes, 1 M. & S. 593; and in these, as well as in many subsequent cases, the distinction drawn between a thing *malum in se* and *malum prohibitum* was overruled.

"In 1803 the case of Bowry v. Bennet, 1 Camp. 348, was tried before Lord Ellenborough. A prostitute was sued for the value of clothes furnished, and pleaded that the plaintiff well knew her to be a woman of the town, and that the clothes in question were for the purpose of enabling her to pursue her calling. His lordship said: 'It must not only be shown that he had notice of this, *but that he expected to be paid from the profits of the defendant's prostitution*, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it.'

"In 1813 Hodgson v. Temple, 5 Taunt. 181, was decided. There the action was for the price of spirits sold with the knowledge that defendant intended to use them illegally. There was a verdict for plaintiff, and a motion for a new trial was refused by the court, Sir James Mansfield saying: 'This would be carrying the law much farther than it has ever yet been carried. The *merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that it is necessary that the vendor*

should be a sharer in the illegal transaction.'

"This decision was given in November, 1813, and is the more remarkable because the case of Langton v. Hughes, 1 M. & S. 593, had been decided exactly to the contrary in the king's bench in the month of June in the same year, and was not noticed by the counsel or the court in Hodgson v. Temple. Langton v. Hughes was first tried before Lord Ellenborough at nisi prius. It was an action for the price of drugs sold to the defendants, who were brewers, the plaintiffs knowing that defendants intended to use the drugs for mixing with beer—a use prohibited by statute. His lordship charged the jury that the plaintiffs, in *selling drugs to the defendants, knowing that they were to be used contrary to the statute, were aiding them in a breach of that act*, and therefore not entitled to recover. He, however, reserved the point. The ruling was maintained by all the judges, and it was distinctly asserted as the true principle, that 'parties who seek to enforce a contract for the sale of articles which in themselves are perfectly innocent, but which *were sold with a knowledge that they were to be used for a purpose which is prohibited by law*, are not entitled to recover.'

"The leading case of Cannan v. Bryce, 3 B. & Ald. 179, was decided in the king's bench in 1819. The question was whether money lent for the purpose of enabling a party

that his intention in making the sale was not the ordinary purpose to dispose of his goods to the best advantage, but to actively aid or promote the illegal purpose for which the goods were brought.¹

to pay for losses and compounding differences on illegal stock transactions could be recovered. All the previous cases were reviewed, and the court took time to consider. The opinion was delivered by Abbott, C. J., and the principle was stated as follows: 'The statute in question has absolutely prohibited the payment of money for compounding differences (*i. e.*, in stock bargains); it is impossible to say that making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a *full knowledge of the object to which they were to be applied*, and for the *express purpose of accomplishing that object*.' The money lent was therefore held not recoverable. The case of *Langton v. Hughes* was approved and followed, while *Faikney v. Reynous* and *Petrie v. Hannay* were practically overruled, and the distinction between *malum prohibitum* and *malum in se* pointedly repudiated.

"In *McKinnell v. Robinson*, 3 M. & W. 435, in the exchequer, in 1838, it was held that money knowingly lent for gambling at a game prohibited by law could not be recovered, the case of *Cannan v. Bryce* being referred to by the court as the decisive authority on this subject.

"The latest case, that of *Pearce v. Brooks*, L. R. 1 Ex. 213, was decided

in the same court in 1866. The plaintiff had supplied a brougham to a prostitute. The evidence showed that the plaintiff knew the defendant to be a prostitute, but there was no *direct* evidence that plaintiff knew that the brougham was intended to be used for the purpose of enabling the defendant to follow her vocation; and there was *no* evidence that plaintiff expected to be paid out of the wages of prostitution. The jury found that the defendant did hire the brougham for the purpose of her prostitution, and that the plaintiff *knew it was supplied for that purpose*. It was held, first, not necessary to show that plaintiff expected to be paid from the proceeds of the immoral act; secondly, that the *knowledge by the plaintiff that the woman was a prostitute being proven, the jury were authorized in inferring that the plaintiff also knew the purpose for which she wanted an ornamental brougham*; and thirdly, that *this knowledge was sufficient to render the contract void*, on the authority of *Cannan v. Bryce*, which was recognized as the leading case on the subject."

¹The leading case in the United States is *Tracy v. Talmage* (1856), 14 N. Y. 162, 67 Am. Dec. 132. This was a claim made by the State of Indiana against the receiver of the insolvent North American Trust & Banking Company to recover for bonds sold by the former to the latter. The amount involved was nearly \$350,000. The defense was, among

§ 1014. —. It is true that in many cases the application of this distinction is attended with no little difficulty, and that, as is ordinarily necessary, in determining the intention of the seller as a question of fact from the surrounding circumstances,

other things, that the bank bought for the illegal purpose of a speculative resale, of which purpose the seller had knowledge. The lower courts permitted a recovery, and the receiver appealed. The cause was argued by distinguished counsel in 1855; a re-argument was ordered and had in 1856. The opinion of the court was delivered by Selden, J., who, conceding the disputed question that the seller knew of the purpose for which the buyer bought, reached the conclusion "that it is no defense to an action brought to recover the price of goods sold that the vendor knew that they were bought for an illegal purpose; provided it was not made a part of the contract that they shall be used for that purpose; and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design." Two of the judges were of the opinion that the seller had no knowledge of the unlawful purpose. One dissented from Judge Selden's conclusions, but the four others concurred with him. A motion for re-argument was then made, and the motion was argued in behalf of the receiver by three of the strongest lawyers which the State of New York then contained — Nicholas Hill, Jr., Greene C. Bronson and Samuel Beardsley, who attacked Judge Selden's conclusions with great vigor; but the motion was denied unanimously, Comstock, J., writing the opinion, and all of the judges but two concurring in the conclusions of Selden,

J., as given above. The opinions of Selden and Comstock, JJ., contain an elaborate review of the authorities.

Hill v. Spear (1870), 50 N. H. 253, 9 Am. R. 205, also contains an exceedingly exhaustive collation of the cases, and reaches the same conclusion at which Judge Selden arrived in Tracy v. Talmage. See also the exhaustive discussion in Graves v. Johnson (1892), 156 Mass. 211, 30 N. E. R. 818, 32 Am. St. R. 446. 15 L. R. A. 834, and the notes to that case in the Am. St. R. and L. R. A.

In Anheuser-Busch Brewing Ass'n v. Mason (1890), 44 Minn. 318, 20 Am. St. R. 580, 9 L. R. A. 506, 46 N. W. R. 558, Collins, J., says of Tracy v. Talmage and Hill v. Spear, *supra*: "These cases, now regarded as leading on this side of the Atlantic, announce the rule to be that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale. Yet if, in any way, the former aids the latter in his unlawful design to violate the law, such participation will prevent him from maintaining an action to recover. The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design to transgress, but positive acts in aid of the unlawful purpose are sufficient, though slight. While it is certain that a contract is void when it is illegal or immoral, it is equally as certain that it is not void simply because there is something immoral or illegal in its

juries may in many cases reach conclusions substantially alike under either rule; yet the distinction is not without importance, and the rule as enforced in the United States seems most consonant with reason and justice.

surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes" [citing *Armstrong v. Toler*, 24 U. S. (11 Wheat.) 258, 6 L. ed. 468; *Green v. Collins*, 3 Cliff. (U. S. C. C.) 494; *Dater v. Earl*, 3 Gray (Mass.), 482; *Armfield v. Tate*, 7 Ired. (N. C.) 258; *Read v. Taft*, 3 R. I. 175; *Cheney v. Duke*, 10 Gill & J. 11; *Kreiss v. Seligman*, 8 Barb. (N. Y.) 439; *Michael v. Bacon*, 49 Mo. 474, 8 Am. R. 138; *Brunswick v. Valleau*, 50 Iowa, 120, 32 Am. R. 119; *Webber v. Donnelly*, 33 Mich. 469; *Bishop v. Honey*, 34 Tex. 245; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. R. 907, 12 Am. St. R. 412; *Feineman v. Sachs*, 33 Kan. 621, 52 Am. R. 547, 7 Pac. R. 222; *Rose v. Mitchell*, 6 Colo. 102, 45 Am. R. 520; *Bancher v. Mansel*, 47 Me. 58; *Henderson v. Waggoner*, 2 Lea (Tenn.), 133, 31 Am. R. 591; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Mahood v. Tealza*, 26 La. Ann. 108, 21 Am. R. 546; *Delavina v. Hill*, 65 N. H. 94, 19 Atl. R. 1000]. See also to like effect: *Wallace v. Lark*, 12 S. C. 576, 32 Am. R. 516; *Frolich v. Alexander*, 36 Ill. App. 428; *Schankel v. Moffatt*, 53 Ill. App. 382; *Kerwin v. Doran*, 29 Mo. App. 397.

In certain of the States, however, the English rule prevails. Thus in Alabama it is said that "mere knowledge of the illegal purpose is all the law requires to pronounce judgment against the contract. This is the rigid rule of the common law, from which there should be no departure." *Milner v. Patton*, 49 Ala. 423; *Oxford*

Iron Co. v. Spradley, 51 Ala. 171; *Ware v. Jones*, 61 Ala. 288.

In the very recent case of *Standard Furniture Co. v. Van Alstine* (1900), 22 Wash. 610, 63 Pac. R. 145, involving the validity of a conditional contract to sell furniture which the seller knew was to be used to furnish a house of ill-fame, the court said: "It is urged on behalf of the appellant that the evidence before the trial court upon which it based its judgment showed, at most, nothing more than that the appellant, at the time it entered into the contract of conditional sale and delivered the property to the vendees named therein, had knowledge that the vendees intended to put the property to an unlawful use; and that this fact is not sufficient to justify the trial court in its holding that the contract was void as against public policy. It is true that it is held in many well-considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of a vendor of goods that the vendee designs to and will put them to an immoral or illegal use is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was

§ 1015. — *Malum prohibitum* or *malum in se*.— It is said in the later English cases that there is no distinction in the application of the rule whether the object contemplated

that of debtor and creditor merely, or that of debtor and creditor with a mortgage over to secure the deferred payments of the purchase price. The sale and delivery of the property were complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor. On the other hand, it is held by all of the cases—even those which announce the rule contended for by the appellant—that if the vendor has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover. *Tatum v. Kelley*, 25 Ark. 209; *Tracy v. Tal-
mage*, 14 N. Y. 162; *Hill v. Spear*, 50 N. H. 253; *Gaylord v. Soragen*, 32 Vt. 110; *Aiken v. Blaisdell*, 41 Vt. 655; *Schankel v. Moffatt*, 53 Ill. App. 382; *Ralston v. Boady*, 20 Ga. 449; *Webster v. Munger*, 8 Gray, 584; *Adams v. Coulliard*, 102 Mass. 167; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. R. 818, 15 L. R. A. 834, and note to this case in 32 Am. St. R. 450; *Beach*, Mod. Cont., § 457. And there are cases which hold that knowledge on the part of the vendor that the purchaser intends to devote the property purchased to an illegal use will bar a recovery of the purchase price, even though he does no other act than deliver the property to the vendee. It was so held by the supreme court of the United States in *Hanauer v. Doane*, 12 Wall. 342, 20

L. ed. 439, though the court seems to admit that there might be a distinction between the cases where the use to which the property is to be devoted is only *malum prohibitum*, or of inferior criminality, and the cases where it is to be used in aid of the perpetration of a heinous crime, such as treason, as was the fact in that case. See also *Tatum v. Kelley*, *supra*; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 283; *Bickel v. Sheets*, 24 Ind. 1; *Steele v. Curle*, 4 Dana, 381. Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased, and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vendor, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of its contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved 'title, ownership and possession of the property,' but reserved the right to 'take possession of the aforesaid per-

was *malum prohibitum* or *malum in se*,¹ and this is undoubtedly true in the United States as well, though in determining whether there was that participation in the wrongful purpose which the American rule requires it is impossible to lose sight in many cases of the character and enormity of the offense contemplated; “as where,” to use the language of Clifford, J.,² “the property purchased is intended for treasonable purposes, or to commit murder, or to promote some other offense of such enormity and so violative of the fundamental laws of society that silence on the part of the citizen is itself a crime, or would be evidence tending to show that the seller was an accessory before the fact to the commission of the offense.”

§ 1016. —. In the leading case in the United States supreme court the same distinction is pointed out and enforced.³ “Where to draw the precise line,” said the court, “between the cases in which the vendor’s knowledge of the purchaser’s

sonal property whenever it may deem itself insecure, even before the maturity of the deferred payments. This practically left the control of the use of the property with the appellant, and, as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to some unlawful use, and participating in that unlawful intent, is, to say the least, somewhat refined; and where a vendor, for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be as-

tute to find nice distinctions which will enable him to avoid the consequences of his acts.”

¹ For the earlier view see *Faikney v. Reynous* (1767), 4 Burr. 2070; *Petrie v. Hannay* (1789), 3 T. R. 418. For the later view see *Pearce v. Brooks* (1866), L. R. 1 Exch. 214; *Booth v. Hodgson*, 6 T. R. 405; *Aubert v. Maze*, 2 Bos. & P. 371; *Mitchell v. Cockburn*, 2 H. Bl. 379; *Webb v. Brooke*, 3 Taunt. 6; *Langton v. Hughes*, 1 Maule & S. 593.

² In *Green v. Collins* (U. S. C. C.), 3 Cliff. 494. See also per Comstock, J., in *Tracy v. Talmage*, 14 N. Y., at p. 215.

³ *Hanauer v. Doane* (1870), 79 U. S. (12 Wall.) 342, 20 L. ed. 439. This was a case involving recovery for goods sold in aid of rebellion — a subject which will be fully considered in a later section. *Post*, § 1024.

intent to make an unlawful use of the goods will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definitions. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

§ 1017. — Degree of participation required to invalidate.—As stated in the preceding section, mere knowledge of the unlawful purpose is not, according to the weight of authority in the United States, enough to invalidate the sale, but there must be such participation by the seller in the buyer's purpose as can fairly be said to actively aid and further it. Just what shall be the nature and degree of such participation in any given case it is impossible to define by any more precise and certain rule, as each case must be determined by its own peculiar circumstances.

§ 1018. — As knowledge of the unlawful purpose is not here enough, anything less than knowledge is manifestly insufficient. Reasonable ground for belief, or facts sufficient to put the seller upon inquiry, or even his actual belief, will not suffice.¹ The cases which have required least have not charged the seller with complicity upon anything less than actual knowledge.

§ 1019. — Passing beyond actual knowledge, any active aid or participation in the execution of the buyer's purpose will, as has been said above, invalidate the sale.² Thus, where

¹ *Finch v. Mansfield* (1867), 97 Mass. (1892), 156 Mass. 211, 30 N. E. R. 818, 89; *Lindsey v. Stone* (1877), 123 Mass. 332; *Corning v. Abbott* (1874), 54 N. H. 469. Under a later statute see *Dunbar v. Locke* (1883), 62 N. H. 442. See also *Graves v. Johnson* (1892), 156 Mass. 211, 30 N. E. R. 818, 32 Am. St. R. 446, 15 L. R. A. 834, and exhaustive notes in each series where this general subject is discussed.

² Sale, with a view to illegal resale,

the seller knowingly made the sale ostensibly to a third person for the purpose of aiding the real buyer in evading the provisions of the liquor law, it was held that he had so co-operated in the buyer's purpose as to be a party to it;¹ and the same result was reached where he purposely and as part of the contract packed the goods in such form as would enable the buyer most easily to evade the law;² and also where he put them up in a disguised form in order to enable the buyer to escape detection, even though he did this voluntarily and not in pur-

is invalid. *Webster v. Munger* (1857), 8 Gray (Mass.), 584; *Graves v. Johnson* (1892), 156 Mass. 211, 32 Am. St. R. 446, 15 L. R. A. 834, 30 N. E. R. 818. But see as to these cases, § 1027, note. In *Galligan v. Fannan* (1863), 7 Allen (Mass.), 255, the buyer was really the plaintiff's agent appointed for the purpose of making illegal sales. In *Hubbell v. Flint* (1859), 13 Gray (Mass.), 277, and *Bancher v. Mansel* (1859), 47 Me. 58, it was found that the seller had co-operated with the buyer in his unlawful purpose, and he was not permitted to recover. In *Arnot v. Pittston Coal Co.* (1877), 68 N. Y. 558, 23 Am. R. 190, it was found that the seller had actively aided the buyer's purpose and therefore could not recover. The court, after referring to the general rule that mere knowledge of the buyer's unlawful purpose was not enough, continued: "But—and this is a very important distinction—if the vendor does anything beyond making the sale to aid the illegal scheme of the vendee, he renders himself *particeps criminis*, and cannot recover for the price."

¹ *Foster v. Thurston* (1853), 11 Cush. (Mass.) 322, citing *White v. Buss* (1849), 3 Cush. 448.

² *Feineman v. Sachs* (1885), 33 Kan. 621, 52 Am. R. 547. "Although the

plaintiffs [sellers] would not be affected by the mere knowledge of the unlawful use which the defendant [buyer] was about to make of the packages, still, if they went further, and at the request of the defendant put up the packages in a convenient form for sales in violation of law, and so actively promoted such sale, they would be in the eye of the law, offenders." *Skiff v. Johnson* (1876), 57 N. H. 475. *Hull v. Ruggles* (1874), 56 N. Y. 424 (distinguishing *Tracy v. Talmage*, 14 N. Y. 162, quoted *supra*), is similar. In *Fisher v. Lord* (1885), 63 N. H. 514, 3 Atl. R. 927, "the plaintiffs, to aid the defendant in the resale, and enable him to evade the law and avoid detection, agreed, as a part of their contract of sale, to pack the liquors so as to avoid suspicion; and in executing this part of the contract they concealed the liquors by sending twenty-gallon kegs in sugar barrels, and smaller kegs in boxes packed in sawdust." So in *Materne v. Horwitz* (1886), 101 N. Y. 469, 5 N. E. R. 331, domestic sardines were by the sellers packed in boxes as French sardines in order to deceive the buyer. Under the statute it was a misdemeanor to sell or offer for sale any package falsely labeled as to place of manufacture or quality of goods.

suance of a condition of the sale.¹ And in a very recent case of a conditional contract to sell property known by the seller to be intended for immoral uses, the seller retaining the title and the power to take possession upon default or whenever he deemed himself insecure, the court declared that it was difficult to conceive why he did not thereby aid and participate in the unlawful purpose.²

Turning from general rules to specific instances, a number of the forms in which the question has arisen may be reviewed by way of illustration.

§ 1020. Sales in furtherance of social vices.—The sale of goods to prostitutes which might or might not be of aid to them in carrying on their immoral calling has given rise to no little judicial discussion. In an early English case,³ where the woman was sued for the price of clothing furnished her, and pleaded in defense that the plaintiff knew her character, and that the clothing was for the purpose of enabling her to pursue her calling, Lord Ellenborough said that it must not only be shown that these things were known to the plaintiff, “but that he expected to be paid from the profits of the defendant’s prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it.”

§ 1021. — English rule.—In a later case,⁴ which has been relied upon as showing a change in the view of the English judges, the action was brought by a coach-builder to recover the price of an ornamental brougham sold to a prostitute. The jury found that the plaintiff knew her character, and that the brougham was to be used by her as part of her display to attract men. It was held that there could be no recovery. The

¹ Aiken v. Blaisdell (1869), 41 Vt. 655. Here liquor sold was shipped marked as “benzine” or “cider vinegar;” kegs were packed in barrels or boxes, or concealed in sacks.

Alstine (1900), 22 Wash. 670, 62 Pac. R. 145.

³ Bowry v. Bennet (1803), 1 Camp. 348.

⁴ Pearce v. Brooks (1866), L. R. 1 Exch. 213.

² Standard Furniture Co. v. Van

learned judges took occasion to explain that what had fallen from Lord Ellenborough in reference to the necessity of the plaintiff's expectation to be paid from the profits of the defendant's calling was used by way of illustration merely and was not an essential ingredient in the case; and it is impossible to read the opinions of the judges without being brought to the conclusion that that which was most cogent to their minds was not the mere knowledge of the intended unlawful use, but that the plaintiff had participated in her intention.

§ 1022. —. In the United States it has been held that a furniture dealer who sold furniture to a prostitute could recover its price, although he knew her character and business.¹ "It is not thence to be inferred," said the court, "that he encouraged her in continuing in her immoral course of life. That he contributed to enable her to continue it by selling her the furniture is too vague, hypothetical and remote to form an impediment to his recovery on the contract." So it has been held that one who sells beer to such a woman, which he supposed was to be used or sold at her place of business, may recover for its price.² A contract for the sale of a house is not illegal, although the seller knows that the buyer expects to use it as a house of prostitution;³ but a lease of a house is illegal if the lessor knows and intends that the house will or may be so used;⁴ and so is

¹ Hubbard v. Moore (1872), 24 La. Ann. 591, 13 Am. R. 128. This case was followed in 1874 by Mahood v. Tealza, 26 La. Ann. 108, 21 Am. R. 546 (though it is questionable, at least, whether the latter case was rightly decided, the facts being that both plaintiff and defendant were prostitutes, and that the furniture was sold by one to the other "with the express knowledge and purpose of both" that it was to be used in keeping a house of ill-fame), and by Sampson v. Townsend, 25 La. Ann. 78.

² Anheuser-Busch Brewing Ass'n v. Mason (1890), 44 Minn. 318, 20 Am.

St. R. 580, 9 L. R. A. 506, 46 N. W. R. 558. So a sale of cigars is not illegal because the seller knows that the purchaser will dispose of them in furtherance of his illegal traffic in intoxicating liquors. Delavina v. Hill (1889), 65 N. H. 94, 19 Atl. R. 1000.

³ Sprague v. Rooney (1884), 82 Mo. 493, 52 Am. R. 383. So of a contract for work and labor upon such a house. Bishop v. Honey, 34 Tex. 245.

⁴ Ernst v. Crosby (1893), 140 N. Y. 364, 35 N. E. R. 603; Girarday v. Richardson, 1 Esp. 13; Jennings v. Throgmorton, Ry. & Moo. 251.

a sale of furniture which the seller knows and intends is to be used to furnish a house of prostitution, stipulating that it shall not be sold or removed therefrom without his consent, and providing for payments in instalments which can come only from the business;¹ or where he retains the title, with power to take possession upon default or whenever he deems himself insecure, but otherwise knowingly permits it to be retained.²

§ 1023. Sales in furtherance of gambling.—Within the doctrine of the preceding cases, a sale of that which may be put to a lawful use, as, for example, a billiard table or a pack of cards, is not invalid because the seller knows that the buyer may or will use the article for gambling purposes;³ though if the article has no other use than an unlawful one, participation in the wrongful intent may be inferred.⁴

§ 1024. Sales in aid of the public enemy.—Contracts in aid of the public enemy will not be enforced. The war of the

¹ Reed v. Brewer (1896), 90 Tex. 144, 37 S. W. R. 418.

² Standard Furniture Co. v. Van Alstine (1900), 22 Wash. 670, 62 Pac. R. 145.

³ Brunswick v. Valleau (1878), 50 Iowa, 120, 32 Am. R. 119, does not go so far as the text. That was the case of the sale of a billiard table, and the defense was that the table was to be used for gambling purposes, but the court found that the seller had no knowledge of such purpose, and therefore he recovered. In Bickel v. Sheets (1865), 24 Ind. 1, it was held that the sale of a billiard table was not void because the seller knew that it would be used in gambling.

⁴ In Spurgeon v. McElwain (1834), 6 Ohio 442, 27 Am. Dec. 266, where the keeping of a nine-pin alley in connection with a saloon was prohibited by law, it was held that a carpenter could not recover for building one

appurtenant to such a place. In Michael v. Bacon, 49 Mo. 474, 8 Am. R. 138, it was held that the plaintiff might recover for papering a house though he knew that it was to be used as a gambling house. The distinction between these cases is clear.

A race-track association entered into a contract with the defendant for the right to sell refreshments from a stand or house in which pools were sold and book-making carried on, and their betting booths were a part of the race-track scheme, from which, by sale, the association derived revenue to be used for book-making, the object of providing refreshments being in aid of this scheme. Held, that the contract being in aid of a gambling scheme, the plaintiff could not recover thereon. St. Louis Fair Ass'n v. Carmody (1899), 151 Mo. 566, 52 S. W. R. 365.

Rebellion furnished numerous questions respecting sales in aid of the Confederate States. In one case¹ which involved the right to recover for goods sold to a recognized supply-contractor of the Confederate government, the supreme court of the United States, in holding that no recovery could be had, said: "No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act."

§ 1025. — In several cases in the State courts, however, this case has been distinguished on the ground that the sale to the accredited agent of the Confederate government was really a sale to that government itself, and that the rule should not apply in case of sales to private individuals. Following this distinction, they have held that a sale of a horse, for example, to one who was known to be buying it for use as a soldier in the Confederate army, was not illegal, and the price was therefore recoverable.²

¹ *Hanauer v. Doane* (1870), 79 U. S. (12 Wall.) 342, 20 L. ed. 439. Followed in *Thomas v. City of Richmond*, 79 U. S. (12 Wall.) 349, 20 L. ed. 453; *Hanauer v. Woodruff*, 82 U. S. (15 Wall.) 439, 21 L. ed. 224; *Carlisle v. United States*, 83 U. S. (16 Wall.) 147, 21 L. ed. 426; *Sprott v. United States*, 87 U. S. (20 Wall.) 459, 22 L. ed. 371; *Whitfield v. United States*, 92 U. S. 165, 23 L. ed. 705; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. ed. 654; *Keith v. Clark*, 97 U. S. 454, 24 L. ed. 1071.

So, also, *Lewis v. Latham* (1876), 74 N. C. 283; *Tatum v. Kelley* (1868), 25 Ark. 209, 94 Am. Dec. 717; *Roquemore v. Alloway* (1870), 33 Tex. 461; *Milner v. Patton* (1873), 49 Ala. 423 (overruling *Thedford v. McClintock*, 47 Ala. 647).

² *Wallace v. Lark* (1879), 12 S. C. 576, 32 Am. R. 516; *Tedder v. Odom* (1870), 2 Heisk. (Tenn.) 68, 5 Am. R. 25; *McGavock v. Puryear*, 6 Cold. (Tenn.) 34; *Henderson v. Waggoner*, 2 Lea (Tenn.), 133, 31 Am. R. 591.

§ 1026. **Sales in aid of violations of liquor laws.**— The statutes regulating the sale of intoxicating liquors furnish another source of controversy concerning the rules in question. Bearing in mind that we are not now dealing with the sales which are themselves declared illegal by the statute, but only with sales alleged to be invalid because made in aid or furtherance of such illegal sales, it may be said to be the well-settled rule, in this as in the other cases already considered, that a sale of liquors not in itself illegal is not rendered illegal merely because the seller may know that the buyer may or will resell the liquors in violation of the statute; but that it will be illegal if the seller actively co-operates in or aids the buyer's unlawful purpose.¹

§ 1027. — **Conflict of laws.**— This question has most frequently arisen where the liquors are sold in one State, where such sales are lawful, to be transported for sale in another State whose statutes forbid the sale. Knowledge that the buyer intends to violate the laws of the latter State will not ordinarily prevent a recovery for the price even in the courts of that State,² though this rule has been changed by statute in

¹ Thus, in *Woodford v. Hamilton* (1894), 139 Ind. 481, where the question was whether there could be a recovery for the price of intoxicating liquors sold to a woman, to be retailed by her, when the law did not permit a woman to keep a saloon, it was said that, "it being a part of the contract of sale made by the appellants that they were to be sold in said saloon in violation of law, the retailing of such liquors was not only without authority of law, but against the express provisions of our statutes, and contrary to public policy. Under this condition of affairs the law will not aid the appellants in an effort to enforce their contract, but will leave the parties in the situation in which they have placed them-

selves. *Hutchins v. Weldin*, 114 Ind. 80." To same effect: *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596, 49 N. E. R. 864.

² *Webber v. Donnelly* (1876), 33 Mich. 469; *Hill v. Spear*, 50 N. H. 253, 9 Am. R. 205; *Feineman v. Sachs*, 33 Kans. 621, 7 Pac. R. 222, 52 Am. R. 547; *Bowman Distilling Co. v. Nutt*, 34 Kans. 724, 10 Pac. R. 163; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Tuttle v. Holland*, 43 Vt. 542; *Bank v. Curren*, 36 Iowa, 555.

So of a sale of oleomargarine consummated in Illinois, where such sales are lawful, to be resold in Pennsylvania, where they are unlawful. *Braunn v. Keally* (1892), 146 Pa. St. 519, 28 Am. St. R. 811, 23 Atl. R. 389. One who has furnished labor and

some States;¹ and the cases are numerous in which it has been held that the seller who has actively aided such unlawful design,² as by shipping the goods in a disguised form,³ or in unusual or special packages,⁴ or in a fictitious name,⁵ will not be permitted to recover.

materials for fitting up a bar-room is not precluded from recovery because he knew the place was to be used for illegal sales of liquors. *Bryson v. Haley* (1895), 68 N. H. 337, 38 Atl. R. 1006.

¹ Thus, in *Maine*, the statute expressly provided that no action should be maintained "for any such liquors purchased out of the State with intention to sell the same or any part thereof in violation" of the statute. In *Meservey v. Gray*, 55 Me. 540, Mr. Justice Walton said: "It will be observed that our present statute makes the fact that the liquors were purchased with the intention of selling them in violation of law, and not the seller's knowledge of the fact, the criterion by which to determine whether the contract will support an action in this State or not. . . . If, therefore, the sale was made in New York, and the plaintiffs had no knowledge of the illegal purpose of the defendant to sell the liquors in this State in violation of law, yet, inasmuch as the evidence satisfies us, as a matter of fact, that they were intended for such illegal sale, the plaintiff cannot recover for them." To same effect: *Knowlton v. Doherty* (1895), 87 Me. 518, 33 Atl. R. 18, 47 Am. St. R. 349. The court considered the question whether such a statute interfered with the federal power to regulate interstate commerce, but concluded that it did not.

² *Webster v. Munger* (1857), 8 Gray (Mass.), 584; *Hubbell v. Flint* (1859), 13 Gray (Mass.), 277; *Galligan v. Fannan* (1863), 7 Allen (Mass.), 255; *Orcutt v. Nelson* (1854), 1 Gray (Mass.), 536; *Adams v. Couilliard* (1869), 102 Mass. 167; *Davis v. Bronson* (1858), 6 Iowa, 410; *Winkelmeyer Brew. Ass'n v. Nipp*, 6 Kan. App. 730, 50 Pac. R. 956; *Bancher v. Mansel* (1859), 47 Me. 58; *O'Bryan v. Fitzpatrick* (1886), 48 Ark. 487, 3 S. W. R. 527.

The rule laid down in *Webster v. Munger*, *supra*, was that the sale was void if made "with a view" to their resale in the other State, and this rule is approved in the late case of *Graves v. Johnson* (1892), 156 Mass. 211, 32 Am. St. R. 446, 15 L. R. A. 834, 30 N. E. R. 818, though it seems evident that the court in the latter case contemplate a more active participation than in the former; otherwise these cases cannot be reconciled with the weight of authority elsewhere. *Graves v. Johnson* is followed in *Wasserboehr v. Morgan* (1897), 168 Mass. 291, 47 N. E. R. 126.

³ *Aiken v. Blaisdell* (1869), 41 Vt. 655, where the liquors were marked "benzine" or "cider vinegar."

⁴ *Ante*, § 1019, note; *Feineman v. Sachs* (1885), 33 Kan. 621, 52 Am. R. 547; *Aiken v. Blaisdell*, *supra*; *Skiff v. Johnson* (1876), 57 N. H. 475; *Fisher v. Lord* (1885), 63 N. H. 514, 3 Atl. R. 927; *Hull v. Ruggles* (1874), 56 N. Y. 424; *Materne v. Horwitz* (1886), 101

⁵ *Kohn v. Milcher* (1890), 43 Fed. R. 641, 10 L. R. A. 439; *Gaylord v. Soragen* (1859), 32 Vt. 110, 76 Am. Dec. 154.

§ 1028. — The fact that the order for the goods is solicited and taken in a State whose statutes forbid the sale of the liquor by the buyer does not of itself affect the validity of the sale to the buyer, consummated by the acceptance and filling of such order in another State where no such statutes exist;¹ though it was at one time deemed competent for the former State to declare such soliciting unlawful, and, if it did, that its courts should not enforce a sale made in pursuance of such soliciting, though such sale was made in a State in which like sales are lawful; but this view no longer prevails.²

N. Y. 469, 5 N. E. R. 331. Furnishing barrels and kegs to keep the liquors in until sold is a participation. *Winkelmeier Brew. Ass'n v. Nipp*, 6 Kan. App. 730, 50 Pac. R. 956.

¹Where the person taking the order has no authority to accept it, but it is sent to his principal in the other State and there accepted and filled by unconditional delivery to a carrier for transportation to the buyer, the sale is made in the latter State, and if there valid will be enforced in the State of the buyer, though, if made there, it would have been invalid. *Kling v. Fries*, 33 Mich. 275; *Monaghan v. Reid*, 40 Mich. 665; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. R. 140; *Lynch v. Stott*, 67 N. H. 589, 30 Atl. R. 420; *Tegler v. Shipman*, 33 Iowa, 194, 11 Am. R. 118; *State v. Colby*, 92 Iowa, 463, 61 N. W. R. 187; *Westheimer v. Weisman*, 60 Kan. 753, 57 Pac. R. 969.

An agreement made in Iowa that beer should be shipped from Wisconsin whenever ordered by defendant in Iowa is but a conditional agreement for future sales and does not bind defendant to order any, and a sale and delivery of beer in Wisconsin, on orders given there, are made in Wisconsin. *Miller Brewing Co. v.*

De France (1894), 90 Iowa, 395, 57 N. W. R. 959.

Neither can the purchaser recover back the money he has paid for the liquors under such circumstances. *Wind v. Iler*, 93 Iowa, 316, 61 N. W. R. 1001; *Bollinger v. Wilson*, 76 Minn. 262, 79 N. W. R. 107.

But in *Starace v. Rossi* (1897), 69 Vt. 303, 37 Atl. R. 1109, the court held that, from the fact that the order was taken in Vermont and thence transmitted to New York, where it was filled, the contract was in *part* made in Vermont and was therefore unenforceable. *Backman v. Wright*, 27 Vt. 187, and *Backman v. Mussey*, 31 Vt. 547, were cited approvingly.

²The New Hampshire statute (L. 1876, ch. 33) made the taking of orders "with knowledge or reasonable cause to believe that the liquors will be transported to this State and sold in violation of law" a criminal offense. A traveling agent having taken such an order in New Hampshire with such knowledge sent it to his principals in Boston, who shipped the goods. *Held*, they could not recover for them in the courts of New Hampshire. "Having aided, abetted, procured and hired their agent to

§ 1029. —. Though the seller resides in a State where the sale is lawful, still if the sale is made or is to be performed in a State where such a sale is unlawful, the courts of the latter State will not enforce it.¹ And if the sale is invalid in the latter State because the goods are to be delivered there, though ordered from another State where the sale would have been valid, it is held that the contract is invalid everywhere and will not be enforced in the State from which the goods were ordered.²

violate our laws by soliciting and taking orders for the very liquors embraced in this contract, they cannot with any grace invoke the remedy afforded by our laws to recover the price. No rule of comity requires us to enforce in favor of a non-resident a contract which had its origin in the open violation of law, and which would not be enforced in favor of our own citizens, especially when it is offensive to our morals, opposed to our policy and injurious to our citizens. Its enforcement would tend to nullify the statute which the plaintiffs have caused to be violated. The law which prohibits an end will not lend its aid in promoting the means designed to carry it into effect. It does not promote in one form that which it prohibits in another." *Jones v. Surprise* (1886), 64 N. H. 243. Following this case is *Lang v. Lynch*, 38 Fed. R. 489, 4 L. R. A. 831.

But *Jones v. Surprise*, and *Dunbar v. Locke*, 62 N. H. 442, to the same effect, were expressly overruled in *Durkee v. Moses* (1891), 67 N. H. 115, 23 Atl. R. 793.

¹ *Gipps Brewing Co. v. De France* (1894), 91 Iowa, 103, 58 N. W. R. 1087, where the goods were to be delivered by the seller in the State whose statutes forbade such sale; *Wasserboehr v. Boulrier* (1892), 84 Me. 165, 30

Am. St. R. 344, 24 Atl. R. 808, where the sale was not to be complete until the buyer had had opportunity to test the goods and had approved them at his place of business; *United States v. Shriver*, 23 Fed. R. 134, 31 Alb. L. J. 163, where the goods were sent C. O. D., to be returned to the seller if the buyer did not accept and pay for them; [but see *ante*, § 793; *State v. Carl*, 43 Ark. 353, 51 Am. R. 565; *Pilgreen v. State*, 71 Ala. 368; *Com. v. Fleming*, 130 Pa. St. 138, 17 Am. St. R. 763, 5 L. R. A. 470, 18 Atl. R. 622; *Com. v. Hess*, 148 Pa. St. 98, 33 Am. St. R. 810, 17 L. R. A. 176, 23 Atl. R. 977; *Dunn v. State*, 82 Ga. 27, 3 L. R. A. 199, 8 S. E. R. 806; *Pearson v. State*, 66 Miss. 510, 4 L. R. A. 835, 6 S. R. 243; *contra*, so far as criminal liability, at least, is concerned, though even as to this point the cases are not in harmony, as, for example, *Bagby v. State*, 82 Ga. 786, 9 S. E. R. 721 (distinguishing *Dunn v. State*, *supra*); *People v. Shriver*, *supra*; *State v. O'Neil*, 58 Vt. 140, 2 Atl. R. 586. See also *State v. Basserman*, 54 Conn. 88, 6 Atl. R. 185.]

Gipps Brewing Co. v. De France is supported by *Suit v. Woodhall*, 113 Mass. 391, and approved in *Winkelmeyer Brewing Ass'n v. Nipp*, 6 Kan. App. 730, 50 Pac. R. 956.

² *Hamm Brewing Co. v. Young*

§ 1030. **Sales promotive of wagering speculation — Speculating in “futures.”**— Wagering contracts, as such, were not invalid at common law unless affected with some special cause of illegality, as, for example, that they were calculated to injure third persons, or were immoral in their subject-matter, or were opposed to a sound public policy. They were, however, early restrained by the English statutes and discountenanced by the English courts. In the United States, judicial opinion has been still more strongly opposed to them, and in most of the States the exceptions have become the rule, and all wagering contracts are denied enforcement. In many of the States, also, there are express statutory declarations against them.¹

§ 1031. —. The cases, however, in which this ground of illegality has been most frequently urged in connection with the subject of sale are those involving a contract for the sale and future delivery of merchandise, or what have popularly come to be known as “futures.” There is no legal objection to a sale of goods to be delivered in the future, even though the seller be not possessed of the goods at the time, and have no other means of acquiring them than to go into the market and buy them. If the parties actually intend a sale and delivery of the goods, the contract is entirely valid; but if, under the guise of such a contract, valid on its face, the real intention of the parties is not to deliver the goods, but merely to speculate in the rise or fall of prices and to pay the difference between the contract price and the market price at the time agreed upon, then the transaction is a wagering one and is void.² This conclu-

(1899), 76 Minn. 246, 79 N. W. R. 111. The facts here were that Young, who was a resident of Fargo, N. D., telephoned from that place to the brewing company at Moorhead, Minn., ordering beer *to be delivered at his residence* in Fargo. At this time the statute of North Dakota forbade the sale of beer in that State. The court held that the sale was made in North Dakota, and, “the sales being illegal,

void and non-enforceable in the State where they were made, no action can be maintained upon them in this State.” One judge dissented.

¹ The subject of the validity of wagering contracts generally is quite fully discussed in the opinion and notes to *Bernard v. Taylor* (1893), 23 Oreg. 416, 37 Am. St. R. 693, 18 L. R. A. 859, 31 Pac. R. 968.

² *Lester v. Buel*, 49 Ohio St. 240, 34

sion is reached by the English courts under the provisions of the English statutes;¹ but in the United States, though there

Am. St. R. 556, 30 N. E. R. 821; *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. R. 23, 5 L. R. A. 432, 18 N. E. R. 687; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 17 Am. St. R. 918, 7 L. R. A. 705, 13 S. W. R. 127; *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. R. 745, 4 S. W. R. 713; *Oliphant v. Markham*, 79 Tex. 543, 23 Am. St. R. 363, 15 S. W. R. 569; *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. R. 787, 10 S. W. R. 526; *Kahn v. Walton*, 46 Ohio, St. 195, 20 N. E. R. 203; *Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 22 N. E. R. 49; *Sprague v. Warren*, 26 Neb. 326, 3 L. R. A. 679, 41 N. W. R. 1113; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. R. 593; *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. R. 521; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. R. 441; *Hatch v. Douglass*, 48 Conn. 116, 40 Am. R. 154; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. R. 390; *Gregory v. Wendell*, 40 Mich. 432; *Donovan v. Daiber*, — Mich. —, 82 N. W. R. 848; *Wall v. Schneider*, 59 Wis. 352, 48 Am. R. 520, 18 N. W. R. 443; *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. R. 573; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. R. 308; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. R. 349; *Irwin v. Williar*, 110 U. S. 499; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. R. 950; *In re Chandler*, 13 Am. L. Reg. (N. S.) 310; *Cobb v. Prell*, 5 McCrary, 80, 15 Fed. R. 774, 22 Am. L. Reg. (N. S.) 609; *Bartlett v. Smith*, 4 McCrary, 388, 13 Fed. R. 263; *Bryant v. Western Union Tel. Co.*, 17 Fed. R. 825; *Kirkpatrick v. Adams*, 20 Fed. R. 287; *Bangs v. Hornick*, 30 Fed. R. 97; *Mutual L. Ins. Co. v. Watson*, 30 Fed. R. 653; *Ward v. Vosburgh*, 31 Fed. R. 12; *Boyd v. Hanson*, 41 Fed. R.

174; *Perryman v. Wolffe*, 93 Ala. 290, 9 S. R. 148; *Hawley v. Bibb*, 69 Ala. 52; *Tomblin v. Callen*, 69 Iowa, 229, 28 N. W. R. 573; *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41; *Lowe v. Young*, 59 Iowa, 364; *Counselman v. Reichart*, 103 Iowa, 430, 72 N. W. R. 490; *Phelps v. Holderness*, 56 Ark. 300, 19 S. W. R. 921; *Watte v. Wickersham*, 27 Neb. 457, 43 N. W. R. 259; *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. R. 383; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. R. 862; *Billingslea v. Smith*, 77 Md. 504, 26 Atl. R. 1077; *Lawton v. Blitch*, 83 Ga. 663, 10 S. E. R. 353; *Davis v. Davis*, 119 Ind. 511, 21 N. E. R. 1112; *Rumsey v. Berry*, 65 Me. 570; *Clay v. Allen*, 63 Miss. 426; *Gaw v. Bennett*, 153 Pa. St. 247, 25 Atl. R. 1114; *Waugh v. Beck*, 114 Pa. St. 422, 6 Atl. R. 923; *Harper v. Young*, 112 Pa. St. 419, 3 Atl. R. 670; *Griffiths v. Sears*, 112 Pa. St. 523, 4 Atl. R. 492; *Brna's Appeal*, 55 Pa. St. 294; *North v. Phillips*, 89 Pa. St. 250; *Dunn v. Bell*, 85 Tenn. 581, 4 S. W. R. 41; *Beadles v. Ownby*, 16 Lea (Tenn.), 424; *Beadles v. McElrath*, 85 Ky. 231, 3 S. W. R. 152; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. R. 403; *Burt v. Myer*, 71 Md. 467, 18 Atl. R. 796; *Cover v. Smith*, 82 Md. 586, 34 Atl. R. 465; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. R. 1084; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. R. 646; *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. R. 762.

¹ The English statute of 8 & 9 Vict., ch. 109, sec. 18, provides that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." Under this statute contracts of the kind now under consideration

are general statutes against gambling,¹ and though many special statutes have been expressly enacted against this form of gambling,² the same conclusion is almost unanimously arrived at upon grounds of public policy.³

§ 1032. —. Unless so declared by statute, it is not enough to render the contract void that one party only intended by it merely to speculate in prices: it must appear that such was the intention of both of the parties to the contract,⁴ and that

have been held void. *Grizewood v. Blane* (1851), 11 Com. B. 526.

But, as will be seen in § 1039, a broker employed to conduct such transactions upon commission may recover where he has not participated in the wrongful intention. *Thacker v. Hardy* (1878), L. R. 4 Q. B. Div. 685, where the opinion is expressed that the jury in *Grizewood v. Blane*, *supra*, came to a wrong conclusion upon the facts. (But in *Barnard v. Backhaus*, 52 Wis., at p. 604, *Cole, C. J.*, expresses the opinion that the judges in *Thacker v. Hardy* "draw a very fine sight and are quite astute in finding reasons to uphold the contract.")

Where both parties to contracts for the sale and purchase of stocks intend that no stocks shall be delivered and that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase does not prevent their invalidity under the statute. *Universal Stock Exchange v. Strachan*, [1896] App. Cas. 166.

¹ General statutes against gaming have been held to render contracts void whose purpose was merely a settlement of differences. *Dunn v. Bell* (1886), 85 Tenn. 581, 4 S. W. R. 41; *McGrew v. City Produce Ex-*

change, 85 Tenn. 572, 4 S. W. R. 38; *Barnard v. Backhaus* (1881), 52 Wis. 593, 6 N. W. R. 252, 9 N. W. R. 595; *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. R. 269; *Lowry v. Dillman*, 59 Wis. 197, 18 N. W. R. 4; *Wall v. Schneider*, 59 Wis. 352, 18 N. W. R. 443, 48 Am. R. 520; *Flagg v. Baldwin* (1884), 38 N. J. Eq. 219, 48 Am. R. 308; *Bigelow v. Benedict* (1877), 70 N. Y. 202, 26 Am. R. 573.

² As in *Arkansas* (Dig. Stats. 1884, § 1848), *Georgia* (Code, § 2638), *Illinois* (Rev. Stats. 1883, ch. 38, § 131), *Iowa* (L. 1884, ch. 93), *Kentucky* (Stats. 1884, ch. 1613), *Michigan* (Comp. L. 1897, §§ 11, 373; 3 How. Stats., § 9354f), *Mississippi* (L. 1882, ch. 117), *Ohio* (L. 1885, p. 254), *South Carolina* (Stats. 1883, No. 306), *Texas* (L. 1887, ch. 113), and *Wisconsin* (L. 1881, ch. 81).

³ See *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. R. 160; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. R. 252, 9 N. W. R. 595; *Gregory v. Wendell*, 40 Mich. 432; *Dickson v. Thomas*, 97 Pa. St. 278; *Love v. Harvey*, 114 Mass. 80; *Lyon v. Culbertson*, 83 Ill. 33; *Melchert v. American Union Tel. Co.* (1882), 11 Fed. R. 193, and cases cited in note 2, § 1031.

⁴ "If either party meant it as a lawful and legitimate transaction, it must be held to be lawful and legiti-

such was their intention when they made it.¹ And where the contract is fair upon its face, the courts will not presume that it was made the cover of an illegal transaction: the party who alleges the illegality must assume the burden of establishing it.²

mate." per Cooley, J., in *Gregory v. Wendell*, 40 Mich. 432. To same effect: *Wall v. Schneider*, 59 Wis. 352, 18 N. W. R. 443, 48 Am. R. 520; *Murry v. Ocheltree*, 59 Iowa, 435, 13 N. W. R. 411; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. R. 441; *Clay v. Allen*, 63 Miss. 426; *Williams v. Carr*, 80 N. C. 294; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. R. 713, 1 Am. St. R. 745, and note; *Sawyer v. Taggart*, 14 Bush (Ky.), 727, 18 Am. L. Reg. (N. S.) 222, and note; *Pixley v. Boynton*, 79 Ill. 351; *Lehman v. Strassberger*, 2 Woods, 554; *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. R. 521; *Taylor v. Bailey*, 169 Ill. 181, 48 N. E. R. 200; *Donovan v. Daiber*, — Mich. —, 82 N. W. R. 848.

The rule is changed by statute in Tennessee (Acts 1883, ch. 251). *McGrew v. Produce Exchange*, 85 Tenn. 572; and in Missouri: *Connor v. Black* (1893), 119 Mo. 126, 24 S. W. R. 184.

¹ If the contract was valid when made, the fact that the parties subsequently see fit to settle upon the basis of the difference does not affect its validity. *Wall v. Schneider*, 59 Wis. 352, 18 N. W. R. 443, 48 Am. R. 520 (citing *Brua's Appeal*, 55 Pa. St. 294; *Smith v. Bouvier*, 70 Pa. St. 325; *Fareira v. Gabell*, 89 Pa. St. 89; *Clarke v. Foss*, 7 Biss. 540; *Gilbert v. Gauger*, 8 Biss. 214; *Williar v. Irwin*, 11 Biss. 57; *Sawyer v. Taggart*, 14 Bush, 727); *Kent v. Miltenberger*, 13 Mo. App. 503; *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. R. 521.

On the other hand, though the parties might not originally have deemed

the contract absolute, still if the purchaser subsequently elects to treat it as an absolute purchase, it is said that "this made it valid whatever had been its original character." *Estate of L. H. Taylor & Co.* (1899), 192 Pa. St. 313, 43 Atl. R. 975, citing *Peters v. Grim*, 149 Pa. St. 167; *McNaughton v. Haldeman*, 160 Pa. St. 144; *Anthony v. Unangst*, 174 Pa. St. 10.

² *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. R. 713, 1 Am. St. R. 745, and note; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. R. 160; *Cockrell v. Thompson*, 85 Mo. 510; *Conner v. Robertson*, 37 La. Ann. 814, 55 Am. R. 521; *Rumsey v. Berry*, 65 Me. 570; *Bigelow v. Benedict*, 70 N. Y. 202, 26 Am. R. 573; *Williams v. Carr*, 80 N. C. 294; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. R. 441; *Clay v. Allen*, 63 Miss. 426; *Bangs v. Hornick*, 30 Fed. R. 97; *Ward v. Vosburgh*, 31 Fed. R. 12; *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41, 23 N. W. R. 255; *Pratt v. Boody*, 55 N. J. Eq. 175, 35 Atl. R. 1113.

Where, however, the contract is, apparently, within the forbidden class, or the circumstances are such as to impeach its validity, it is said to be the duty of the party who seeks to sustain it to make it affirmatively appear to be legitimate. *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. R. 252, 9 N. W. R. 595; *Sprague v. Warren*, 26 Neb. 326, 3 L. R. A. 679, 41 N. W. R. 1113; *Cobb v. Prell*, 5 McCrary, 80, 15 Fed. R. 774, 22 Am. L. Reg. (N. S.) 609.

The question whether the contract is a wagering one or not, within the rule, is one of fact for the jury.¹

§ 1033. — **Legitimate speculation.**— It must be kept in mind that it is not merely speculation which is deemed illegal,— for it is entirely legitimate to buy property with the hope of profiting by its rise in value:² the vice in the prohibited contracts is that there is really no purchase or intent to purchase and receive the property, but simply, under the guise of such a sale, to lay a wager upon the rise or fall of the market price.

§ 1034. —. The fact that there may be an option vested in one party as to the time or the fact of delivery is also of itself harmless, unless declared otherwise by statute;³ if an actual sale and delivery are contemplated in the event of the exercise of the option, the contract is a valid one; otherwise it is invalid.⁴ A “put,” therefore, which is an option to sell,⁵

¹Gregory v. Wendell, 39 Mich. 337, 33 Am. R. 390; Gregory v. Wendell, 40 Mich. 432; Gaw v. Bennett, 153 Pa. St. 247, 25 Atl. R. 1114; Brand v. Lock, 48 Ill. App. 390; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. R. 383; Cover v. Smith, 82 Md. 586, 34 Atl. R. 465.

²Thus, in Gregory v. Wendell, 40 Mich. 432, Cooley, J., says: “That if the parties contemplated an actual purchase of corn, and acted in good faith in making such purchases, the fact that speculation was the object was of no legal importance whatever. . . . The right to buy grain in the open market in the hope to profit by a rise in market value is as plain as the right to buy wild lands or any other property.”

³The Illinois statute forbids an “option to sell or buy at a future

time.” The construction supposed to be put upon this statute by the earlier cases, such as Wolcott v. Heath, 78 Ill. 433; Pickering v. Cease, 79 Ill. 328; Pixley v. Boynton, 79 Ill. 351; Tenney v. Foote, 95 Ill. 99; Pearce v. Foote, 113 Ill. 228, seems to be modified in Schneider v. Turner, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. R. 497, in which it is held that, while prior to the act it was lawful to contract to have or give an option to sell or buy grain or other commodity at a future time, they are now unlawful and void.

⁴“The optional contracts that are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered.”

⁵A “put” is defined in Pixley v. Boynton, 79 Ill. 351, as “a privilege of delivering or not delivering the

grain.” See also In re Chandler, 13 Am. L. Reg. (N. S.) 310; Cobb v. Prell, 22 Am. L. Reg. (N. S.) 603, note.

or a "call," which is an option to buy,¹ or a "straddle," which is an option to buy or sell,² is not *per se* invalid; it is valid or not according as the parties, or one of them, contemplated an actual sale and delivery of the goods.

§ 1035. — The fact that one party is required to deposit a "margin" for the security of the other is likewise not conclusive;³ for a margin may accompany an actual and *bona fide* transaction as well as a fictitious one; neither is the fact that the transaction is to be governed by the rules or prices prevailing in a particular "chamber of commerce;"⁴ or that delivery is to be made in warehouse receipts rather than in specie.⁵

§ 1036. — **Form of contract immaterial.**—The form which the contract takes is unimportant, for it is the substance of the transaction which determines its nature. The question in each case, to which all other considerations are obviously subordinate, is, What was the intention of the parties at the time they

Gregory v. Wattowa, 58 Iowa, 711, 12 N. W. R. 726. To same effect: Williams v. Tiedeman, 6 Mo. App. 269; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Wall v. Schneider, 59 Wis. 352, 18 N. W. R. 443, 48 Am. R. 520; Story v. Salomon, 71 N. Y. 420; Melchert v. Telegraph Co., 11 Fed. R. 193; Union National Bank v. Carr, 15 Fed. R. 438.

In Estate of L. H. Taylor & Co. (1899), 192 Pa. St. 304, 43 Atl. R. 973, quoting from Peters v. Grim, 149 Pa. St. 163, it is said: "Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the

meanwhile, without affecting the legality of the operation."

The statute in Illinois changes the rule for that State. See preceding note.

¹ A "call," as defined in Pixley v. Boynton, *supra*, is a "privilege of calling or not calling for the grain." See also note to Cobb v. Prell, 22 Am. L. Reg. (N. S.) 609.

² A "straddle" means the double privilege of a "put" and a "call." Harris v. Tumbridge, 83 N. Y. 92, 38 Am. R. 398.

³ Whitesides v. Hunt, 97 Ind. 191, 49 Am. R. 441; Wall v. Schneider, 59 Wis. 352, 18 N. W. R. 443, 48 Am. R. 520; Hatch v. Douglass, 48 Conn. 116, 40 Am. R. 154.

⁴ Wall v. Schneider, *supra*.

⁵ Gregory v. Wendell, 39 Mich. 337, 33 Am. R. 390; Wall v. Schneider, *supra*; Farnum v. Pitcher, 151 Mass. 470, 24 N. E. R. 590.

entered into this transaction? And in determining this question all the circumstances surrounding the transaction may be taken into account, and the jury have the right "to go behind the mere form given to their transactions and ascertain from all the evidence the real purpose of the parties and the actual character of their dealings with each other."¹

§ 1037. — Mere agreement to repurchase unobjectionable.— The mere fact, however, that the sale is coupled with an agreement by the seller to repurchase the property at the same or some other price, within some period named, does not bring the contract within the contemplation of either the common law or the statutory rules governing the so-called option contracts.² As said by the court in Illinois: "It is difficult to see how a contract of that character can be termed a gambling contract, or one that should be prohibited by law. Is it contrary to law or justice, or does it violate any rule of public policy, for a person to sell a horse, a cow, a promissory note or a bond for a specified sum, and agree to take the article back within a given time for the same price?"

§ 1038. — Or that vendee has an option as to quantity. So the mere fact that the vendee in a contract of sale has an option as to the quantity of goods which he will receive under the contract — as in the familiar agreements to supply another with such goods as he may require in a given season — does not make the contract such an optional one as is condemned by the rules or statutes above considered.³

¹ *Gaw v. Bennett*, 153 Pa. St. 247, 25 Atl. R. 1114. That the form of the contract does not control see also:

Barnard v. Backhaus, 52 Wis. 593, 6 N. W. R. 252, 9 N. W. R. 595; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. R. 390; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. R. 441; *Tenney v. Foote*, 95 Ill. 99; *Melchert v. Am. Un. Tel. Co.*, 11 Fed. R. 193; *Justh v. Holliday*, 2 Mackey (D. C.), 346.

² *Wolf v. National Bank of Illinois* (1899), 178 Ill. 85, 52 N. E. R. 896;

Ubben v. Binnian (1899), 182 Ill. 508, 55 N. E. R. 552; *Richter v. Frank*, 41 Fed. R. 859.

³ *Minnesota Lumber Co. v. Whitebreast Coal Co.* (1896), 160 Ill. 85, 43 N. E. R. 774.

§ 1039. — **Effect upon rights of brokers and other agents.**—The gambling feature of such contracts may not only affect the rights of the immediate parties to the contract, but it may also extend in its operation to collateral and incidental contracts, such as that existing between one of the parties and his broker or agent through whom the contract was negotiated. The question here most frequently arising is whether the broker or other agent can recover his commissions earned or his advances, expenditures or losses incurred in negotiating or conducting illegal speculations for his principal. This question must be determined by the nature and extent of his knowledge of and participation in the illegal intention of his principal. For it is said by the supreme court of the United States,¹ speaking through Mr. Justice Matthews, and the rule laid down is sustained by the great weight of authority² in the United States: "It is certainly true that a broker might negotiate such a contract without being privy to the

¹ *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. R. 160.

² *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. R. 950; *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 S. Ct. R. 776; *White v. Barber*, 123 U. S. 392, 31 L. ed. 243, 8 S. Ct. R. 221; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. R. 593; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. R. 308; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. R. 713, 1 Am. St. R. 745; *Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 22 N. E. R. 49; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. R. 203; *Pearce v. Foot*, 113 Ill. 228, 55 Am. R. 414; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. R. 646; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. R. 441; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 17 Am. St. R. 918, 7 L. R. A. 705, 13 S. W. R. 127; *Riordan v. Doty*, 50 S. C. 537, 27 S. E. R. 939; *Wagner v. Hildebrand*, 187 Pa. St. 136, 41 Atl. R. 34.

It has been thought in some cases that if, at the close of the negotiations, a note had been given to the agent for the amount due him, he could recover on the note. See *Lehman v. Strassberger*, 2 Woods, 554; *Hentz v. Jewell*, 20 Fed. R. 592. But this distinction is denied in other cases. *Embrey v. Jemison*, *supra*; *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. R. 593; *Cothran v. Ellis*, *supra*.

Under the codes of Georgia and Tennessee the infirmity extends to any holder of the note (*Moss v. Exchange Bank*, 102 Ga. 808, 30 S. E. R. 267; *Cunningham v. National Bank*, 71 Ga. 400, 51 Am. R. 266; *Snoddy v. American Nat. Bank*, *supra*); but, in the absence of such a statute, a *bona fide* holder of the note may recover upon it. *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. R. 23, 5 L. R. A. 432, 18 N. E. R. 687.

illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."

§ 1040. Sales in furtherance of unlawful combinations.—In some instances by express statute, and in others by force of the common law, combinations in restraint of trade, to avoid competition, or to create monopolies are illegal; and, in accordance with the principles of the foregoing sections, contracts of sale which have for their purpose to aid or promote such an unlawful end may be avoided.¹ Thus, a contract for the sale of stock, made for the purpose of bringing about an unlawful consolidation of corporations against the objection of the minority, is illegal and will not be enforced;² and an agreement of sale and purchase whose object is to bring about a "corner" in the corn market falls within the same prohibitions.³

§ 1041. Sales designed to impose upon the public.— "The authorities," it is said in a recent case,⁴ "conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract or aid a party where the purpose is to cheat and deceive the public gener-

¹ See *Arnot v. Pittston, etc.* Coal Co. (1877), 68 N. Y. 558, 23 Am. R. 190; *Morris Run Coal Co. v. Barclay Coal Co.* (1871), 68 Pa. St. 173.

² *Tompkins v. Compton*, 93 Ga. 520, 21 S. E. R. 79.

³ *Foss v. Cummings*, 149 Ill. 353, 36 N. E. R. 553.

⁴ *Church v. Proctor* (1895), 66 Fed. R. 240, 13 C. C. A. 426, 33 U. S. App. 1. So in *Materne v. Horwitz* (1886), 101 N. Y. 469, 5 N. E. R. 331, it was held that the price could not be recovered for goods packed with false labels, though here there was a statute against it.

ally." "Humanity," it is said in the same case, "is entitled to know what it buys and consumes. Government is instituted and maintained and law is administered for the protection of the people; and justice influenced by enlightened public policy and controlled by legal principles requires that contracts shall not be upheld and enforced for the benefit of a wrong-doer, where the subject-matter thereof is designed to be used in furtherance of a public enterprise which contemplates imposition upon the general public through false, misleading and deceptive brands and labels placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not." Accordingly, in this case, it was held that one who had contracted for the purchase of fish which he intended to pack and label in such manner as to deceive the public as to their character could not maintain an action to recover damages for a failure to supply him with the fish as agreed.

§ 1042. **Sales of public offices.**—"By the theory of our government, all offices, whether civil or military, whether general or professional, are trusts held solely for the public good, and in which no man can have a property to sell or can acquire one by purchase."¹ Contracts, therefore, for the sale, transfer or assignment of public offices are opposed to the policy of the law and void.²

§ 1043. — **Lex loci.**—It is the general rule that contracts which are valid where made are valid everywhere, and if void where made are void everywhere. Their validity is to be determined ordinarily, therefore, by the law of the place where made, unless they are to be performed in some other place, in which event the law of the latter place controls.³ These principles have usually been applied to the contracts now under

¹ Ames, C. J., in *Eddy v. Capron*, 4 Dec. 530; *Edwards v. Randle*, 63 Ark. R. I. 394, 67 Am. Dec. 541. 318, 38 S. W. R. 343, 36 L. R. A. 174.

² *Mechem on Public Officers*, §§ 356-358; *Eddy v. Capron*, *supra*; *Groton v. Waldoborough*, 11 Me. 306, 26 Am. § 1059.

³ As to liquor laws see *ante*, §§ 1027-1029. As to Sunday laws, see *post*,

consideration;¹ but in a few cases courts have refused to give effect to contracts which they deemed repugnant to their local policy, although such contracts would have been enforced in the State in which they were made.²

¹ As in *Williams v. Carr*, 80 N. C. 294; *Tredway v. Riley*, 32 Neb. 495, 49 N. W. R. 268, 29 Am. St. R. 447.

So the court of one State will enforce the statute of another State in which the contract is to be performed. *Osgood v. Bauder*, 75 Iowa, 550, 1 L. R. A. 655, 47 N. W. R. 1001.

² In *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. R. 308, a contract made in New York and valid there was refused enforcement in New Jersey because opposed to the policy of that State. So, under a statute, in Mississippi. *Lemonius v. Mayer* (1893), 71 Miss. 514, 14 S. R. 33. So in South Carolina. *Gist v. W. U. Tel. Co.*, 45 S. C. 344, 23 S. E. R. 143.

In *Schlee v. Guckenheimer* (1899), 179 Ill. 593, 54 N. E. R. 302, the court said: "By the common law, contracts of this character are valid, as under the common law a contract to have or give an option to sell or buy, at a future time, grain or other commodity was neither voidable nor void. *Schneider v. Turner*, 130 Ill. 28. The first two special counts allege a breach of this contract, and specially aver that it was valid when made, in the State of Ohio. The additional count avers the contract was a legal and binding contract in the State of Ohio, where the same was entered into and was to be executed. Courts do not, as a rule, take judicial notice of the laws of another State or country, and their statutes or local usages must be averred and proven when relied on to aid in sustaining a cause of action or defense

in this State. Such is not the rule, however, in reference to the common law, which, in the absence of proof to the contrary, will be presumed to prevail in the States of the Union. On a common-law question, therefore, the courts of one State will assume that the common law is in force in a sister State, unless proof to the contrary is made. *Crouch v. Hall*, 15 Ill. 263. Under the averments of this declaration this suit is brought on a contract which was valid at common law and will be presumed to be valid in the State of Ohio, where it was made and to be executed. The common law would govern the construction of the contract, as the principle is, the *lex loci* governs in ascertaining whether the contract is valid and what it means. *Shurman v. Gassett*, 4 Gilm. 521; *Woodward v. Brooks*, 128 Ill. 222; *Mineral Point R. Co. v. Barron*, 83 id. 365.

"Where a contract is legal and binding in the State where made and is to be executed and was to be performed, the courts of this State will, upon the principle of comity, enforce the *lex loci contractus* (*Hone v. Ammons*, 14 Ill. 29; *Roundtree v. Baker*, 52 id. 241), where such agreement will not be dangerous, inconvenient, immoral, or contrary to the public policy of the *lex fori*. *Phinney v. Baldwin*, 16 Ill. 108; *McAllister v. Smith*, 17 id. 328; *Mumford v. Canty*, 50 id. 370. By his demurrer the defendant admits the contract was valid and binding in the State of

II.

INVALIDITY BY STATUTE.

§ 1044. What enactments render a sale void.—An attempted sale may also be rendered invalid by reason of a statute designed to prevent such sales. Such statutes may take a variety of forms: Thus, the statute may expressly declare that

Ohio, and the only question that arises must depend on whether the contract violates the public policy of this State or is in violation of its laws. That question must depend upon the construction of section 130 of the Criminal Code, as applicable to the facts of this case as presented by this contract.

“By the contract appellee sold five cars of sample B barley at sixty-two cents a bushel and five cars of sample C barley at fifty-seven cents a bushel, to be delivered at Columbus, Ohio, for cash, shipments to be made on October 10 and 15, 1887. This violated no provision of the statute nor any rule of the common law, and was acted on by the parties and carried out. It was a contract of sale, with a particular time of performance, at a specified price of a particular commodity, to be delivered at a specified place, the failure to comply with which contract by the seller or buyer would authorize the other to have his action for such non-compliance. These five cars of each grade are by the contract declared to be sample cars, and when ‘received, weighed and examined and found satisfactory, Mr. Schlee has the privilege to order ten thousand bushels more of each grade, same price, any time to December 31, 1887.’ This clause alone does not amount to a contract. It is a mere offer to sell ten thousand bushels each of two different grades

of barley, according to sample, at a specified price for each grade, the offer to be accepted by a specified time. The clause does not constitute a contract for an option, such as that in *Schneider v. Turner*, 130 Ill. 28. The contract in that case was: ‘In consideration of \$1, and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell, etc., 1,785 shares of capital stock, etc., at \$600 per share,’ etc., which was clearly a contract for an option.

“This proposition or offer is similar to every-day business transactions among the people of this State with reference to every character of commodities purchased for use. The offer to sell such a commodity at a specified price, if accepted by a specified time, does not constitute a violation of the statute. Its acceptance within that time is not prohibited or made a criminal offense, but is an every-day transaction necessary in carrying on business. There is nothing in this contract that is prohibited by the laws of this State, and hence it is not void. Nothing that was said in *Pope v. Hanke*, 155 Ill. 617, would require us to hold its provisions void. In that case the court found that the contract then before the court was a mere gambling contract, and was prohibited by the policy and laws of this State.”

all sales made in contravention of it shall be illegal or void;¹ it may forbid the sale and impose a penalty without expressly declaring the sale void; or it may simply impose a penalty upon the seller in case he makes a sale without, in terms, forbidding it.² In the first case there can be no room for question as to the legislative intention,³ and the attempted sale must be held to be a nullity with all that that implies. In the other cases there may be room for doubt whether, under a particular statute, the sale itself is void, or whether, merely, the seller has not subjected himself to the penalty, leaving the sale valid. It may be said of one statute that it was designed to prohibit the sale, but of another that the statute was designed simply to secure revenue from sales which in themselves are left completely valid. Much difference of opinion has existed and somewhat arbitrary rules have been laid down upon this subject.

§ 1045. —. It has been said that wherever a penalty is imposed a prohibition is implied;⁴ but the true rule seems to be that, while ordinarily a penalty implies a prohibition, the court will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or

¹ See Anson on Contracts (7th ed.), 185; *Rossmann v. McFarland* (1859), 9 Ohio St. 369.

² See *Aiken v. Blaisdell* (1869), 41 Vt. 655.

³ See Anson, Contracts, *supra*.

⁴ *Woods v. Armstrong* (1875), 54 Ala. 150, 25 Am. R. 671, and note, contains a very full collection of the cases to the effect that "a penalty inflicted by statute upon an offense implies a prohibition, and a contract relating to it is void, even where it is not expressly declared by the statute that the contract shall be void." But *Woods v. Armstrong* and most, if not all, of the cases referred to were dealing with statutes designed to secure protection to the public or individuals against fraud or imposition in

the sale. See also *Law v. Hodgson*, 2 Camp. 147; *Foster v. Taylor*, 3 Nev. & Man. 244; *Bensley v. Bignold*, 5 B. & Ald. 335; *Drury v. Defontaine*, 1 Taunt. 131; *Hallett v. Novion*, 14 Johns. (N. Y.) 273; *Wheeler v. Russell*, 17 Mass. 258; *Harris v. Runnels*, 12 How. (U. S.) 80, 13 L. ed. 901; *Youngblood v. Birmingham Trust Co.*, 95 Ala. 521, 20 L. R. A. 58, 12 S. R. 579; *Shippey v. Eastwood*, 9 Ala. 198; *Robertson v. Hays*, 83 Ala. 290; *Moog v. Hannan*, 93 Ala. 503, 9 S. R. 596; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. R. 299; *Miller v. Post*, 1 Allen (Mass.) 434; *Mitchell v. Smith*, 1 Bin. (Pa.) 110, 2 Am. Dec. 417; *Pray v. Burbank*, 10 N. H. 377; *Durgin v. Dyer*, 68 Me. 143; *Naglebaugh v. Mining Co.*, 21 Ind. App. 551, 51 N. E. R. 427.

prevent, and the purpose sought to be accomplished in its enactment; and if from all these it is evident that it was not the intention to imply a prohibition or render the prohibited act void, the court will so declare and uphold the sale.¹ If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purposes of the statute, the inference is that the statute was intended to be directory to the officers or persons contemplated, rather than prohibitory of the contract.²

§ 1046. — Further of their construction.— Considerations of the revenue,³ or of public or private protection against imposition or fraud, are of course material in determining the

¹ This is substantially the language of *Pangborn v. Westlake*, 36 Iowa, 546, and is quoted with approval in *Miller v. Ammon* (1892), 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. R. 884.

In *Harris v. Runnels* (1851), 12 How. (U. S.) 80, 13 L. ed. 901, it is said: "It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. *When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.*" This language also is quoted with approval in *Miller v. Ammon*, *supra*.

² This is substantially the language of *Bowditch v. New England Life Ins. Co.* (1886), 141 Mass. 292, 55 Am. R. 474, 4 N. E. R. 798.

³ The distinction made in the earlier English cases (such as *Brown v. Duncan*, 10 B. & C. 93, and *Johnson*

v. Hudson, 11 East, 180) between those statutes which were designed for the protection of the revenue and those designed for the protection of the public has been said (Note, 25 Am. R. 675, and per *Wayne, J.*, in *Harris v. Runnels*, 12 How. 80) to be overruled by *Cope v. Rowlands*, 2 Mees. & Wels. 149. It is believed, however, with all deference, that this conclusion has been reached by too hasty a reading of the opinion by Baron Parke. The conclusion attributed to him begs the very question which he was seeking to decide, as is evident from the emphasis which he gives to certain expressions. He says "that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object." This is obviously true, but the very question is whether "*the contract*" has been rendered illegal, and this the learned judge admits in the next sentence. "The sole question is whether the statute *means to pro-*

legislative intent, though not necessarily conclusive of it.¹ But wherever the statute is aimed at the protection of individuals

hibit the contract." He then refers to certain of the earlier cases and then proceeds to apply the very distinction which he is thought to have overruled. "The question for us," he says, "now to determine is whether the enactment of the statute . . . is meant *merely* to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it; or whether *one* of its objects be the protection of the public and the prevention of *improper* persons acting as brokers." The italics are his.

Revenue Acts.—The distinction between mere revenue acts and statutes for protection is also clearly made and applied in *Mandelbaum v. Gregovich*, 17 Nev. 87, 45 Am. R. 433, 28 Pac. R. 121. See also *Niemeyer v. Wright*, 75 Va. 239, 40 Am. R. 720; *Eberstadt v. Jones*, 19 Tex. App. 480, 48 S. W. R. 558; *Larned v. Andrews* (1871), 106 Mass. 435, 8 Am. R. 346; *Aiken v. Blaisdell* (1869), 41 Vt. 655; *Ruckman v. Bergholz* (1874), 37 N. J. L. 437; *Corning v. Abbott* (1874), 54 N. H. 469. It is also well put by that learned judge, Bronson, in *Griffith v. Wells*, 3 Denio (N. Y.), 226, as follows: "When a license to carry on a particular trade is required for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, it may be that a sale without a license would be void. But if the statute looks beyond the question of revenue, and has in view the protection of the public health or morals, or the prevention of frauds by the seller, then, though there be nothing but a penalty, a contract

which infringes the statute cannot be supported."

¹ The distinction is very clearly made by Morton, C. J., in *Bowditch v. New England L. Ins. Co.*, 141 Mass. 292, 55 Am. R. 474, 4 N. E. R. 798, as follows: "It is a rule universally accepted that if a statute prohibits a contract in the sense of making it unlawful for any one to enter into it, such a contract, if made, is wholly void, and cannot be enforced. But it is often a difficult question to determine whether a statute forbidding an act to be done, or enjoining the mode of doing it, is prohibitory, so as to make any contract in violation of it absolutely void, or whether it is directory in its purpose, and does not necessarily invalidate the contract. Though it may be impossible to formulate a rule which will reconcile all the adjudications, yet the decisions recognize a clear distinction between these two classes of cases. There is a large class of cases, both in this country and in England, in which statutes have enacted, in substance, that goods should only be sold in certain measures, or in a certain manner, or after being inspected and branded by public officers; and it has been held that contracts of sale which do not meet the requirements of such statutes are absolutely void. The purpose of such statutes is to protect the buyer from the imposition of the seller—a purpose which would be wholly thwarted unless the contracts are held void, and therefore the intention of the legislature to make them void is inferred. *Miller v. Post*, 1 Allen, 434, and cases cited; *Libbey v. Downey*, 5 Allen,

or the public against fraud, imposition or deception *in the sale*, this fact furnishes the strongest evidence that the legis-

299; *Sawyer v. Smith*, 109 Mass. 220, and cases cited; *Benjamin on Sales*, §§ 530 *et seq.*

"So statutes prohibiting any work on the Lord's day, except works of necessity or charity, have been construed to make entirely void any contract made in violation of their provisions. On the other hand, there are numerous cases where statutes forbid certain acts to be done, and in a sense forbid certain contracts to be made, and yet it is held that contracts made in contravention of the statutes are not void. When usurious contracts were forbidden by our laws, under a penalty of forfeiting threefold the amount of interest reserved or taken, the act of making such a contract was illegal, but the contract was not void. The imposition of the defined penalty showed that the legislature did not intend that the contract should be wholly void, as this would be imposing an added penalty. *Merrill v. McIntire*, 13 Gray, 157.

"In *Larned v. Andrews*, 106 Mass. 435; s. c., 8 Am. R. 346, it was held that the provisions of the internal revenue laws of the United States, prohibiting any person from carrying on the business of wholesale dealers in merchandise until they should have paid the special tax therein provided for, did not invalidate sales made by persons who failed to comply with the statute, or prevent them from recovering the price of the goods sold. The same point was decided in *Aiken v. Blaisdell*, 41 Vt. 655.

"The Revised Statutes of the United States respecting national banks provide that a bank shall not

lend to any person, corporation or firm a sum exceeding one-tenth part of the capital stock actually paid in, and that national banks shall not take real estate as collateral security except for debts previously contracted; and it has been repeatedly held that contracts made in contravention of the statute are not void. *Gold Mining Co. v. National Bank*, 96 U. S. 640; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Reynolds v. Crawfordsville National Bank*, 112 U. S. 405.

"Where the officers of a savings bank invest its funds in a manner forbidden by statute, such illegal action of the officers does not impair the validity of the investment. *Holden v. Upton*, 134 Mass. 177.

"Many other cases might be cited in which it has been held that contracts made in violation of the provisions of statutes are not void, upon the ground that the statutes are intended merely to be directory to the officers or persons to whom they are addressed, and not to be conditions precedent to the validity of contracts made in reference to them. Each statute must be judged by itself as a whole, regard being had not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purposes of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract."

lature intended to invalidate sales made in violation of the statute.¹

§ 1047. — Discrimination must also be made between those cases in which the sale itself is aimed at, and those in which matters incidental or preliminary or collateral to the sale only were in the legislative mind. There is a distinction obviously between a statute forbidding a sale and a statute which imposes a penalty upon “offering for sale” or upon “carrying to sell” or “exposing for sale.”² If the sale itself is declared invalid, the declaration must be given effect regardless of the legislative reason; if collateral acts only are aimed at the sale may be allowed to stand. As stated by Baron Parke in a case often referred to³ (the italics being his), “if *the contract* be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute *means to prohibit the contract.*”

§ 1048. — **Repeal of statute.**—Where, under the statute, the contract is void, the subsequent repeal of the statute does not give validity to the contract.⁴

¹ Bowditch v. New England L. Ins. Co., 141 Mass. 292, 55 Am. R. 474, 4 N. E. R. 798; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 13 Sup. Ct. R. 884; Moog v. Hannon, 93 Ala. 503, 9 S. R. 596; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. R. 299; Griffith v. Wells, 3 Denio (N. Y.), 226; Penn v. Bornman, 102 Ill. 523; Seidenbender v. Charles, 4 Serg. & R. (Pa.) 151, 8 Am. Dec. 682; McConnell v. Kitchens, 20 S. C. 430, 47 Am. R. 845; Wood v. Armstrong, 54 Ala. 150, 25 Am. R. 671.

² A sale is not necessarily invalid because the statute imposes a penalty for “offering for sale” goods which have not been inspected or stamped as the statute requires. The sale may have been effected without

any such “offering,” and in that case is valid. Williams v. Tappan (1851), 23 N. H. 385. Followed in Brackett v. Hoyt (1854), 29 N. H. 264.

And the same is true where the statute prohibits, not the sale, but the “carrying to sell” or “exposing for sale.” Jones v. Berry. (1856), 33 N. H. 209. See also Briggs v. Hunton (1895), 87 Me. 145, 32 Atl. R. 794.

³ Cope v. Rowlands, 2 M. & W. 150.

⁴ Woods v. Armstrong, 54 Ala. 150, 25 Am. R. 671; Bancher v. Mansel, 47 Me. 58; Gilliland v. Phillips, 1 S. C. 152; Handy v. Publishing Co., 41 Minn. 188, 42 N. W. R. 872; Roby v. West, 4 N. H. 285; Bailey v. Mogg, 4 Denio (N. Y.), 60. But see Central Bank v. Empire Stone Co., 26 Barb.

§ 1049. — **Illustrations of effect.**—The reported cases furnish many illustrations of the principles discussed in the preceding sections. The kind of prohibition which has given rise to most frequent litigation is the statute, now so common in every State, regulating the sale of intoxicating liquors. The language of these statutes is usually so specific as to leave little room for construction; but even though the language is not specific as to the validity of the sale, still, inasmuch as these statutes are designed for the protection of the public morals, it is quite universally held that the imposition of a penalty implies a prohibition which renders void the sale and prevents any action for its enforcement.¹

§ 1050. —. So, upon the ground that public or private morals were to be protected, or fraud, artifice or deception in the sale prevented, it has been held that penalties inflicted implied a prohibition and rendered unenforceable the contract for the sale of goods which have not been inspected or stamped as required by law;² or which are not of the required dimensions,

(N. Y.) 23; *Washburn v. Franklin*, 35 Barb. 599; *Curtis v. Leavitt*, 15 N. Y. 1, 85.

¹See cases cited *ante*, §§ 1026-1029.

²Thus, in *Richmond v. Foss* (1885), 77 Me. 590, 1 Atl. R. 830, followed in *Knight v. Burnham* (1897), 90 Me. 294, 38 Atl. R. 168, it was held that a seller cannot recover the price of manufactured lumber sold and delivered without the official survey required by the statute. *Abbott v. Goodwin*, 37 Me. 203, and *Rogers v. Humphrey*, 39 Me. 382, were distinguished. In the earlier case of *Durbin v. Dyer* (1878), 68 Me. 143, the same court had held that no action could be maintained for the price of hoops sold without being culled and branded as required by statute. In the southern States the familiar statutes designed to insure the qual-

ity of fertilizers have given rise to many similar decisions. Thus there can be no recovery for fertilizers sold when they had not been inspected and certified in the manner which the statute specified, and imposed a penalty for selling without. **Alabama:** Code 1896, § 386; *Woods v. Armstrong* (1875), 54 Ala. 150, 25 Am. R. 671; *Campbell v. Segars* (1886), 81 Ala. 259, 1 S. R. 714; *Steiner v. Ray* (1887), 84 Ala. 93; *Clark's Cove Guano Co. v. Dowling* (1887), 85 Ala. 142; *Merriman v. Knox* (1892), 99 Ala. 93; *Brown v. Adair* (1894), 104 Ala. 652; *Kirby v. Milling Co.* (1894), 105 Ala. 529; *Hanover Nat. Bank v. Johnson* (1890), 90 Ala. 549. **Georgia:** Code 1895, § 611; *Conley v. Sims* (1883), 71 Ga. 161; *Allen v. Pearce* (1890), 84 Ga. 606, 10 S. E. R. 1015. **Kentucky:** *Vanmeter v. Spurrier*

size or weight;¹ or which have not been gauged by the specified standard, as if they have been weighed when the statute required measurement or the contrary;² or which have not been weighed or measured by standards duly certified;³ or otherwise fail to conform to the statutory regulation.⁴

§ 1051. —. And though the statute was aimed chiefly at securing revenue, yet if it also expressly or impliedly *prohibits the sale*, the sale cannot be enforced.⁵ But, on the other hand, under similar statutes, if the sale is not prohibited and the penalties of the statute are aimed simply at some act or omission of the seller affecting the revenue, as, for example, his omission to procure a license, it is held that the sale is valid and may be enforced, even though the seller has made himself liable to the penalty.⁶

1893), 94 Ky. 22, 21 S. W. R. 337.
South Carolina: McConnell v. Kitchens (1883), 20 S. C. 430, 47 Am. R. 845.

¹ Recovery cannot be had for shingles under the statutory size. Wheeler v. Russell (1821), 17 Mass. 258 [distinguished in Coombs v. Emery (1837), 14 Me. 404]; nor for bricks where the statute imposes a penalty for the sale of them under a given size. Law v. Hodson (1809), 11 East, 300.

² There can be no recovery for oats and meal sold by the bag where the statute expressly requires "that the same shall be bargained for and sold by the bushel" (Eaton v. Kegan (1874), 114 Mass. 433); or for coal which has not been officially weighed as required by the statute (Libby v. Downey (1862), 5 Allen (Mass.), 299), or measured. Little v. Poole (1829), 9 B. & Cr. 192, 17 Eng. C. L. 93.

³ No recovery can be had for goods sold and weighed upon scales not adjusted, sealed or recorded as re-

quired by statute. Bisbee v. McAllen (1888), 39 Minn. 143, 39 N. W. R. 299; Finch v. Barclay (1891), 87 Ga. 393, 13 S. E. R. 566; Palmer v. Kelleher (1873), 111 Mass. 320.

So no action lies to recover the price of milk sold by the can, at wholesale, in cans not sealed according to the statute, although the State sealer refused to seal them for the statute price. Miller v. Post (1861), 1 Allen (Mass.), 434.

⁴ As in Elkins v. Parkhurst (1843), 17 Vt. 105, where a tender of unsealed leather, in payment of a debt, was held bad.

⁵ Such was the case in Best v. Bauder (1865), 29 How. Pr. (N. Y.) 489; Ferdon v. Cunningham (1860), 20 How. Pr. 154. So where the act is *contra bonos mores*. Solomon v. Dreschler (1860), 4 Minn. 278.

⁶ As in Mandlebaum v. Gregovich, 17 Nev. 87, 28 Pac. R. 121, 45 Am. R. 433; Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245; Niemeyer v. Wright, 75 Va. 239, 40 Am. R. 720; Hill v.

§ 1052. **Sunday sales — Statutes forbidding.**— Contracts made upon Sunday were not thereby invalid at common law. Their invalidity is the result of express statutory enactments, and the statutes must therefore be consulted in determining the nature and extent of the prohibitions they impose. Such statutes are, moreover, usually penal in their nature and receive a strict construction; courts will not be astute, certainly, in extending their prohibitions further than the language used reasonably requires. A statute which forbids work, labor or business would forbid sales;¹ but not so of one which simply forbids “labor,”² or “labor” which “disturbs the peace and good order of society.”³ So a statute which declares that no one shall “expose to sale” any wares or merchandise applies only to the public exposure of goods for sale and does not apply to mere private sales;⁴ and, if the statute forbids only the pursuit of one’s “ordinary calling,” a private sale by one whose business is not the sale of goods is not within the statute.⁵ Contracts of necessity or charity are usually excepted from the operation of the statute, and a sale might, under some circumstances, be deemed to fall within this exception.⁶

Smith, Morris (Iowa), 70; Brown v. Duncan, 10 B. & C. 93; Johnson v. Hudson, 11 East, 180; Larned v. Andrews, 106 Mass. 435, 8 Am. R. 346; Ruckman v. Bergholz, 37 N. J. L. 437; Corning v. Abbott, 54 N. H. 469; Aiken v. Blaisdell, 41 Vt. 655; Rahter v. Bank, 92 Pa. St. 393; Smith v. Mawhood, 14 M. & W. 452.

¹ Arbuckle v. Reaume (1893), 96 Mich. 243, 55 N. W. R. 808; Quarles v. State (1891), 55 Ark. 10, 17 S. W. R. 269.

² Birks v. French (1878), 21 Kan. 238.

³ Richmond v. Moore, 107 Ill. 429, 47 Am. R. 445.

⁴ Boynton v. Page (1835), 13 Wend. (N. Y.) 425; Eberle v. Mehrbach (1874), 55 N. Y. 682.

So, where the statute expressly forbids “public selling,” private sales are not forbidden. Ward v. Ward (1899), 75 Minn. 269, 77 N. W. R. 965.

So, where the statute is directed at keeping open a house or place of business. Moore v. Murdock (1864), 26 Cal. 514.

⁵ Hazard v. Day (1867), 14 Allen (Mass.), 487, 92 Am. Dec. 790; Clark on Contracts, 395; Swann v. Swann (1884), 21 Fed. R. 299; Bloom v. Richards (1853), 2 Ohio St. 387; Drury v. Defontaine (1808), 1 Taunt. 131; Allen v. Gardiner (1861), 7 R. I. 22; Sanders v. Johnson (1859), 29 Ga. 526.

A tender of goods previously sold, made on Sunday, is good under such a statute. Amis v. Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463.

See also Bloxsome v. Williams, 3 B. & C. 232; Rex v. Whitnash, 7 B. & C. 596; Hellams v. Abercrombie, 15 S. C. 110; George v. George, 47 N. H. 27.

⁶ See Allen v. Duffie (1880), 43 Mich.

§ 1053. — **Their effect.**— Assuming, however, that the language of the statute forbids sales made upon Sunday, the question next arises, What is the effect of this prohibition upon the rights and remedies of the parties?

If the contract has not been performed on either side, its performance will not be enforced; the prohibition of the statute is, of course, a sufficient excuse for not performing. But supposing the contract to be fully performed on both sides — the chattel delivered and the price paid, — will the law aid or compel the parties to undo it? The court in Michigan has deemed it most consonant with sound policy to treat the contract as void and to permit and aid the parties to disaffirm it and recover what they have parted with.¹ The majority of the courts,

1, 38 Am. R. 159; *Aldrich v. Blackston* (1880), 128 Mass. 148.

Thus a statute providing that rooms, etc., in which intoxicating liquors are exposed for sale shall be kept closed on Sunday was held not to prevent inn and boarding-house keepers, engaged in the liquor traffic, from supplying the ordinary meals to regular boarders on that day. *State v. Gregory* (1879), 47 Conn. 276. And in *Carver v. State* (1879), 69 Ind. 61, 35 Am. R. 205, it was held that where a hotel proprietor keeps a cigar stand as part of the establishment, from which cigars were sold on week days to his guests, boarders and customers, a sale of cigars from the same stand in the same way, on Sunday, was not unlawful.

¹In *Tucker v. Mowrey* (1864), 12 Mich. 378, it was held that a person who had sold a chattel on Sunday might restore the consideration and regain the chattel by replevin. Said the court, per Christiancy, J.: "Can the vendor of property sold and delivered on Sunday, by tendering to the vendee the consideration re-

ceived, recover back the property as if no such sale had been made?

"The court below charged the affirmative of this proposition; and, if correct, the judgment must be confirmed. The statute (R. S. of 1846, ch. 43, sec. 1; Comp. L., § 1574) provides that 'no person shall keep open his shop, warehouse or workhouse, or shall do any manner of labor, business or work, except work of necessity or charity, on the first day of the week; and every person so offending shall be punished by a fine not exceeding ten dollars for each offense.'

"It was held in *Adams v. Hamell*, 2 Doug. (Mich.) 73, that this statute rendered void a contract made on Sunday for the exchange of horses, and a note given for the difference.

"This decision we fully approve. The statute not only makes it a penal offense, but takes away the legal capacity of the parties to make a contract on that day. And whether the supposed contract has been executed or remains executory, we think the rights of the parties are to be determined in the same manner

however, have not treated the executed contract as void, but have applied the usual rule of leaving the parties where they have placed themselves, and have refused their aid, even in disaffirmance of the contract.¹

as if no such contract had ever been made. The contract as such can neither be set up as the basis of an action nor as a ground of defense. If it be a contract of sale, accompanied by payment and delivery, as supposed in the present case, no property passes, and the vendor, by tendering back what he has received, may reclaim the property, and the vendee, on tendering back the property, may recover the money or property given in payment or exchange, as if no pretense of such contract existed.

"Whether the action could be sustained without such tender is a question which does not arise in this case, and we therefore express no opinion upon it. But being utterly void, the contract is incapable of ratification.

"Doubtless the subsequent acts and assent of the parties may be such as to create a new contract, but they cannot ratify that which is void. And perhaps the acts and conversations of the parties on Sunday, in reference to a contract, might be shown as explanatory of their subsequent acts and conversations tending to show a new contract.

"As a general rule, courts of law have left the parties to an executed illegal contract in the positions in which they have placed themselves, refusing to aid either of them when equally in fault. But this is a question purely of public policy, and consequently there are exceptions to the rule. Courts should give or refuse their aid as the one or the other

course will be most likely to discourage such contracts and to promote the public welfare. The illegality here in question is of a peculiar kind. The contract is not illegal in respect to the consideration, or the thing done or agreed to be done; these are neither immoral nor forbidden by law. The illegality consists wholly in making the contract on a particular day. This suit is not brought to enforce the contract, but in disaffirmance of it. And we think it much more in accordance with sound public policy to treat the contract as utterly void, and to allow the plaintiff, by tendering back what he has received (or doing what is in his power to place the vendee *in statu quo*), to recover back his property, than to refuse him a remedy, and thereby to affirm the contract as valid. To refuse all remedy in such cases would be to open a wide door to fraud. It would operate not only as a trap to the ignorant and unwary, but as a direct encouragement to swindling."

So in *Winfield v. Dodge*, 25 Mich. 355, 7 N. W. R. 906, 40 Am. R. 476, a party who had traded horses upon Sunday was permitted in replevin to regain his horse after offering to restore the one he had received.

¹ In *Foster v. Wooten*, 67 Miss. 540, 7 S. R. 501, it is said: "Grant, then, that the sale was made on Sunday; what is the rule of law on such state of facts? Nothing more than absolute non-action. It will give neither party to the contract any assistance, nor listen to any complaint. It will

§ 1054. — **Contract partly performed.**— If the contract has been performed on one side but not upon the other, as if the goods have been delivered but the price has not been paid, or if the price has been paid but the goods not delivered, the

leave the parties where it finds them. That is the extent of the rule." In *Kelley v. Cosgrove*, 83 Iowa, 229, 48 N. W. R. 979, it is said: "It is well settled that the law will not aid the parties to enforce a contract made on Sunday. Thus, if A sells his horse to B on Sunday on credit, the law will not aid him to enforce a payment. It will sooner permit him to suffer the loss. Much less will it, if he sells his horse on Sunday, and receives in money the full value thereof, assist him on Monday to return the money and regain his horse." In *Myers v. Meinrath*, 101 Mass. 366, 3 Am. R. 368, it is said: "That contracts made upon the Lord's day are illegal; that no action based upon such a contract can be maintained in a court of law or equity, either to enforce its obligations or to secure its fruits, in favor of either party, are propositions settled beyond controversy. But such contracts are not altogether inoperative. They may be executed by the parties, and then the same principle of public policy which leads courts to refuse to act, when called upon to enforce them, will prevent the court from acting to relieve either party from the consequences of the illegal transaction. This may indirectly give effect to the executed illegal contract. The purpose of the law, however, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of or relief from their illegal contracts. In such cases the defense of illegality prevails, not as

a protection to the defendant, but as a disability in the plaintiff. Upon this principle, possession, acquired from an illegal transaction, or by a contract fully executed, will often avail the party holding it as a sufficient title. Neither party is allowed to impeach its validity by asserting the illegality of his own act. The transaction takes effect from the disability of the parties to assert any right to the contrary. The court does not give it effect, but simply refuses its aid to undo what the parties have already done. *Chitty on Cont.* (10th Am. ed.) 732; *Johnson v. Willis*, 7 Gray (Mass.), 164; *King v. Green*, 6 Allen (Mass.), 139; *Worcester v. Eaton*, 11 Mass. 368." It was therefore held in *Myers v. Meinrath* that replevin could not be maintained by one party to recover what he had parted with under a Sunday trade. So also *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. R. 638.

So far has the effect of the Sunday contract in passing the title been carried that it was held in *Kinney v. McDermot* (1881), 55 Iowa, 674, 39 Am. R. 191, 8 N. W. R. 656, that one who has received property under a Sunday contract may replevy it if the former owner retakes it without his consent. The facts in this case were that on a Sunday A and B agreed to exchange horses, and A was to pay B \$25 boot on the following Sunday. On the day of the agreement, Sunday, the horses were exchanged. On the following Tuesday, B went to A's stable, in A's absence,

same difference in policy would appear—the majority of the courts not only refusing to enforce the contract either directly or indirectly, but also refusing to assist one party in regaining what he had parted with;¹ while the courts in Michigan, though refusing to enforce, would aid in undoing the contract.²

left the horse he had received of A and took away the one he had delivered to A. A day or two later A replevied from B the horse which had been delivered to him, and at the time of the trial A had both horses in his possession and had neither paid nor tendered the \$25. It was held that A was entitled to maintain the replevin suit.

And in *Thompson v. Williams* (1878), 58 N. H. 248, A sold two cows to B on Sunday for \$75. The cows were delivered the same day, but the money was not paid. Some days afterwards A took the cows into his own possession. B sued A in trespass and recovered the value of the cows as damages, on the ground that the title had passed by the Sunday sale. A then sued B for the unpaid purchase price; it appeared by his own testimony on cross-examination that the sale was made on Sunday. *Held*, that he could not recover, and that B was not estopped, by reason of his recovery in the trespass case, from relying upon the illegality of the Sunday sale.

The courts have also refused to interfere in analogous cases relating to land. *Ellis v. Hammond*, 57 Ga. 179.

Creditor not disaffirm.—As the courts will not aid the party himself to recover his property, they will not aid his creditors in doing so. *Greene v. Godfrey*, 44 Me. 25; *Smith v. Bean*, 15 N. H. 577; *Blass v. Anderson*, 57 Ark. 483, 22 S. W. R. 94. Hence, where the owner of a wagon sold it

on Sunday and this purchaser resold it to another who was ignorant of the Sunday transaction, it was held that the wagon was not liable to attachment at the suit of a creditor of the first seller. *Horton v. Buffington*, 105 Mass. 399; *Chestnut v. Harbaugh*, 78 Pa. St. 473. See also *Moore v. Kendall* (1849), 2 Pin. (Wis.) 99, 52 Am. Dec. 145.

Whole contract void.—Unless separable, the whole contract is rendered invalid. *Stewart v. Thayer* (1897), 168 Mass. 519, 47 N. E. R. 420, 60 Am. St. R. 407. Hence in an action on a note, if part of the goods for which it was given were sold on Sunday the note is void *in toto*. *Wadsworth v. Dunnam* (1897), 117 Ala. 661, 23 S. R. 699; *Foreman v. Ahl* (1867), 55 Pa. St. 325, and cases cited *ante*, §§ 1003, 1004.

¹ If the sale has been made and the goods delivered on a Sunday, but the price has not been paid, no action will lie for the recovery of the price. *Pike v. King*, 16 Iowa, 49; *Smith v. Bean*, 15 N. H. 577; *Thompson v. Williams*, 58 N. H. 248. Neither will an action lie upon an implied promise to pay the reasonable value of the goods. *Troewert v. Decker*, 51 Wis. 46, 37 Am. R. 808, 8 N. W. R. 26. Nor can the seller recover from the purchaser who retains the goods upon the theory of a conversion by the latter. *Cohn v. Heimbauch* (1893), 86 Wis. 176, 56 N. W. R. 638; *Block v. McMurray* (1878), 56 Miss. 217, 31 Am. R. 357.

A promissory note, given on Sun-

² See *Tucker v. Mowrey*, 12 Mich. 378, *supra*.

§ 1055. — Contract must be actually made on Sunday. In order, however, that the infirmity now under consideration should attach to the contract, it is essential that it should really have been made on Sunday. Hence, though there were some negotiations on Sunday, if the sale was not actually entered into until a week-day, it is valid.¹

§ 1056. — Invalidity extends to collateral agreement like a warranty.—The infirmity attaching to the sale is not confined to the principal contract—that is, to the transfer of the title, alone; but it extends to the incidental or ancillary contracts, like that of warranty, which are annexed to the main one. No recovery, therefore, can be had on a warranty given with a Sunday sale, for the warranty depends upon the sale.²

day, for the price of the goods, cannot be enforced by the payee. *Wadsworth v. Dunnam* (1897), 117 Ala. 661, 23 S. R. 699; *O'Donnell v. Sweeney* (1843), 5 Ala. 467, 39 Am. Dec. 336; *Adams v. Hamell* (1845), 2 Doug. (Mich.) 73, 43 Am. Dec. 455; *Foreman v. Ahl* (1867), 55 Pa. St. 325 (though if part of the property was not delivered until Monday the seller may recover for that part, not on the note but on the common counts. *Foreman v. Ahl, supra*); though if it bears date on a secular day it is valid in the hands of a *bona fide* holder for value without notice (*Cranson v. Goss* (1871), 107 Mass. 439, 9 Am. R. 45; *Knox v. Clifford* (1875), 38 Wis. 651, 20 Am. R. 28); and where the sale was actually consummated on a week-day but a note for the price given on Sunday, though the note may be unenforceable the price may be recovered. *Tucker v. West* (1874), 29 Ark. 386.

¹On Sunday two parties agreed on the terms of sale of a yoke of oxen, subject to the purchaser's inspection and approval of them. The next day the buyer inspected and approved

the oxen and took them away, paying a part of the price. *Held*, a valid sale. *Moseley v. Vanhooser*, 6 Lea (Tenn.), 286, 40 Am. R. 37. So, in effect, *Evert v. Kleimenhagen*, 6 S. Dak. 221, 60 N. W. R. 851. So in *Rosenblatt v. Townsley* (1881), 73 Mo. 536, where the price was agreed upon on Sunday, but the sale was not completed until the day following, when the goods were delivered, it was held a valid sale. But if the terms of the contract are settled on Sunday, it is invalid though its execution be deferred until a week-day. *Kountz v. Price* (1866), 40 Miss. 341. If the price is fixed on Sunday it cannot control, though the goods were not delivered till Monday. If nothing was said about the price on Monday, the fair or market price and not the agreed price would govern. *Bradley v. Rea* (1867), 14 Allen (Mass.), 20; s. c., 103 Mass. 188, 4 Am. R. 524.

²No action can be maintained to enforce warranty on a Sunday [*Fenley v. Quirk* (1864), 9 Minn. 194, 86 Am. Dec. 93; *Fennell v. Ridler* (1826), 5 Barn. & Cr. 406, 11 Eng. Com. L.

For like reasons, an action for deceit will not lie to recover damages for fraud practiced in, or in inducing, the sale.¹

§ 1057. — **Ratification of Sunday sales.**— Whether the Sunday sale is capable of being ratified and confirmed upon a subsequent week-day is a question respecting which there is much difference of opinion and conflict of authority. It is said on the one hand that the contract is void, and therefore cannot be ratified.² It is asserted on the other hand that the contract is not void but merely voidable, and is therefore capable of ratification and confirmation.³ The true view, however, is be-

517], or other illegal sale. *Howard v. Harris* (1864), 8 Allen (Mass.), 297.

¹ "It is well settled that when parties enter into a contract on Sunday, and either of them undertakes to enforce it by action or to recover damages growing out of the illegal transaction, the law will leave the parties where it finds them and no recovery will be allowed." *Gunderson v. Richardson* (1881), 56 Iowa, 56. See *Roberson v. French*, 12 Metc. (Mass.) 24. *Contra*, *Adams v. Gay*, 19 Vt. 358.

² The contract cannot be ratified in **Massachusetts** because the law creates an infirmity which the act of the parties cannot remove: *Day v. McAllister*, 15 Gray, 433; and for the same reasons, substantially, in **Maine**: *Plaisted v. Palmer*, 63 Me. 576; *Tillock v. Webb*, 56 Me. 100; *Pope v. Linn*, 50 Me. 83; and **Connecticut**: *Grant v. McGrath*, 56 Conn. 333, 15 Atl. R. 370; and **New Hampshire**: *Boutelle v. Melendy*, 19 N. H. 196; and **Mississippi**: *Kountz v. Price*, 40 Miss. 341; and **Minnesota**: *Handy v. Publishing Co.*, 41 Minn. 188, 16 Am. St. R. 695, 4 L. R. A. 466, 42 N. W. R. 872 [but see *Van Hoven v. Irish* (1882), 10 Fed. R. 13]; and **New Jersey**: *Gennert v. Wuestner*, 53 N. J. Eq. 302, 31 Atl. R. 609.

A Sunday sale cannot be ratified in **Michigan**; there must be all the elements of a new contract without any dependence upon the Sunday transaction. *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. R. 27; *Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. R. 906, 40 Am. R. 476; *Allen v. Duffie*, 43 Mich. 1, 4 N. W. R. 427, 38 Am. R. 159; *Arbuckle v. Reaume*, 96 Mich. 243, 55 N. W. R. 808; *Pillen v. Erickson* (1900), — Mich. —, 7 Det. Leg. N. 415. A valid contract cannot be rescinded on Sunday. *Benedict v. Bachelder*, 24 Mich. 425.

³ The leading case on this side is the English case of *Williams v. Paul* (1830), 6 Bingham, 653, 19 Eng. C. L. 295. Here a bargain was made on Saturday evening for the sale of cattle subject to the buyer's inspection and approval next morning. On Sunday the cattle were inspected, approved and delivered, on a term of credit agreed upon the evening before. A dispute afterwards arose as to the identity of one of the cattle with the one which the buyer had selected, and the buyer refused to pay for this one but kept it in his possession. Being afterwards urged to pay, he said he would pay when the time

lieved to be that the contract, because made upon Sunday, is an illegal contract, and that this infirmity, attaching to it by act of the law and not by act of the parties, must thereafter adhere to it notwithstanding the efforts of the parties to re-

was up. He did not pay for this animal and suit was brought. Bayley, J., before whom the cause was tried, thought that as the defendant had kept the beast, and subsequently promised to pay, he was liable for its value on a *quantum meruit*, though not for the price agreed to upon Sunday. Verdict for the plaintiff. Rule entered to set aside verdict and for nonsuit, by reason of the statute. This rule was discharged by the court, Park, Gaselee and Bosanquet, JJ., the former saying: "We hold the defendant liable on the ground taken by the learned judge at the trial, although we regret to be obliged to come to this conclusion because it may have a tendency to defeat the statute. But here it appears that the defendant not only retained the animal, but made a new promise to pay subsequently to the Sunday, and his present refusal is not consistent with the practice of a very sincere Christian." Gaselee, J., said: "I am of opinion that this contract was made on Sunday, but what passed afterwards is sufficient to sustain the verdict. The subsequent promise was sufficient on the *quantum meruit*, or as a ratification of the agreement of Saturday." Bosanquet, J., said: "I am of the same opinion, and think the ground taken by the learned judge at the trial correct. The original contract was on Sunday, but the thing sold was left in the possession of the defendant. Some time afterwards he promised to pay; and the jury having found the value, there is

no ground for impeaching the verdict." Williams v. Paul was doubted by Parke, B., in Simpson v. Nicholls (1838), 3 Mees. & Wels. 240, as explained in note, 5 id. 702. It has, however, had more or less influence upon the law in this country, as the cases now to be cited will show. It is cited with approval in Campbell v. Young, 9 Bush (Ky.), 240; Sayles v. Wellman, 10 R. I. 465; Adams v. Gay, 19 Vt. 358; Smith v. Case, 2 Oreg. 190; Tucker v. West, 29 Ark. 386. But, on the other hand, it was doubted or denied in Tuckerman v. Hinkley, 9 Allen (Mass.), 452; Kountz v. Dickson, 40 Miss. 341; Boutelle v. Melendy, 19 N. H. 196.

In Vermont it is said, in the case of Flinn v. St. John (1879), 51 Vt. 334: "It is well settled in this State—whatever may be the decisions in other States—that the illegality which attaches to a contract executed on Sunday is not an illegality which enters into the subject-matter or essence of the contract, and for that reason renders it void; that such contracts, only being illegal on account of the day on which they are made, are capable of ratification by any act which fairly recognizes them as existing contracts, on a subsequent week-day, like a promise to perform, or pay the amount stipulated therein, or a part payment of the same, or a refusal to return property fraudulently obtained by such contract, or an offer to rescind by the other party and a demand for the return of the property. Lovejoy

move it. They may make a new contract on a secular day, if they will, of the same import as the old one, but in order that the intentions which they had in mind at the time of making the Sunday contract shall subsequently be given legal effect, their subsequent acts must amount in legal contemplation to the making of a new contract.¹

v. Whipple, 18 Vt. 379, 46 Am. Dec. 157; *Adams v. Gay*, 19 Vt. 358; *Sargeant v. Butts*, 21 Vt. 99; *Sumner v. Jones*, 24 Vt. 317. These cases go the full length of holding that any act done by the parties on a week-day which recognizes it as a contract existing between them is a ratification."

So also in **Rhode Island**. In *Sayles v. Wellman* (1873), 10 R. I. 465, it appeared that S. sold and delivered to W. on Sunday a pair of horses for \$340. On the following Tuesday W. paid \$200 and gave his note for the balance, on which the suit was brought. *Held*, that the Sunday contract had been ratified, and also that there was a new promise for which the retention of the property was a sufficient consideration.

Iowa and Arkansas.—A promissory note made on Sunday, and therefore "void," is ratified and made valid by a partial payment made on a secular day (*Russell v. Murdock*, 79 Iowa, 101, 44 N. W. R. 237), or by a subsequent promise to pay. *Tucker v. West*, 29 Ark. 386.

A Sunday contract may be ratified in **Indiana**. *Kuhns v. Gates*, 92 Ind. 66; *Williamson v. Brandenburg*, 6 Ind. App. 97, 32 N. E. R. 1022.

So in **Missouri**: *Gwinn v. Simes* (1875), 61 Mo. 335; *Wilson v. Milligan* (1881), 75 Mo. 41; and **Kentucky**: *Campbell v. Young* (1872), 9 Bush, 240.

In **Wisconsin**, see *Williams v. Lane*, 87 Wis. 152, 58 N. W. R. 77.

In **Maryland**, see *Haacke v. Knights* (1892), 76 Md. 429, 25 Atl. R. 422.

¹ This distinction has been nowhere more clearly made than by Hoar, J., in *Day v. McAllister*, 15 Gray (Mass.), 433. The action was upon a promissory note given upon Sunday for goods then purchased, but which the plaintiff alleged had been ratified by the maker subsequently by his retaining the property and dealing with it as his own. Said the court, per Hoar, J.: "The contract upon which the plaintiff declares, being an illegal contract, expressly prohibited by statute, will not support an action. *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57; *Pattee v. Greely*, 13 Met. 284; *Merriam v. Stearns*, 10 Cush. 257. It has no legal force or obligation. No repudiation by a formal act was necessary to render it inoperative. It had no partial validity such as would make it capable of subsequent completion. The statute which prohibited it was not designed merely for the protection of the defendant, giving him a personal privilege which he might waive; but rested upon grounds of broad public policy. The defendant could not ratify the illegal contract, because its want of validity did not depend in any degree upon his choice. The law annulled it, and there was no subject of ratification. He might make a new one; but any arrangement or agreement between the parties on any subsequent day, whether

§ 1058. — **Consideration required.**—What shall be the consideration which will support this new contract is likewise a question in respect of which the courts differ. The so-called moral consideration to pay for the goods received upon Sunday has been deemed sufficient in some cases; and where the title has not passed and the goods may be recovered, there could be no doubt that permitting the buyer to retain them would be a sufficient consideration for a promise to pay for them;¹ but where the title has passed, or where the seller cannot compel the restoration of the goods, it is difficult to see how anything connected with the Sunday dealings can supply the needful consideration.²

direct and express, or implied from their dealings with each other's property, would be a new and independent transaction. It is not quite accurate to speak of the 'ratification' by a party of something which the law forbids, and which is made void, not from any want of his full consent, but in spite of it. 20 Amer. Jurist, 255. The distinction is clearly regarded in *Williams v. Paul*, 6 Bing. 653, and in the decision of the recent case of *Stebbins v. Peck*, 8 Gray, 553. In the latter case the word 'ratification' is used, it is true, but it is in connection with the word 'adoption,' and was not intended, as the context shows, to give any countenance to the idea that the contract could be made valid *ab initio* by any subsequent agreement between the parties. This action is upon the note, the original illegal contract, and it cannot be maintained."

¹ Mere retention of the property bought on Sunday is not a ratification: there must be an express promise. *Dodson v. Harris* (1846), 10 Ala. 566. There can be no ratification of the Sunday contract; but there may

be a new promise for which the moral obligation to pay in pursuance of the former contract is a sufficient consideration. *Gwinn v. Simes*, 61 Mo. 335. So, in Wisconsin, though there can be no ratification (*Vinz v. Beatty*, 61 Wis. 645, 21 N. W. R. 787), it seems that the delivery of the goods under the Sunday contract is a sufficient consideration for a subsequent promise to pay for them. *Melchoir v. McCarty*, 31 Wis. 252, 11 Atl. R. 605; *Williams v. Lane*, 87 Wis. 152, 58 N. W. R. 77; *Hopkins v. Stefan*, 77 Wis. 45, 45 N. W. R. 676.

If goods are sold and delivered to A and B on Sunday, the sale being induced by the false representations of A made on a previous day, and subsequently, on a week day, the seller demands the price of A and he promises to pay it, this amounts to a sale to A and he is liable for the price. *Winchell v. Carey* (1874), 115 Mass. 560, 15 Am. R. 151.

² See the criticism of Baron Parke upon *Williams v. Paul* in *Simpson v. Nicholls*, 3 Mees. & Wels. 244, as corrected in 5 id. 702.

§ 1059. — **Conflict of laws.**— Where, by the statute of the State, the whole transaction is void because made on Sunday, no recovery can be had, it is held, upon the notes given for the price, when the action is brought in that State, although the payee resides, and the notes are made payable, in another State where no such statute is shown to exist.¹

But, in accordance with the general rule,² if the contract were made in a State which had no statute or in which no statute was shown to exist, it will be enforced in another State although in that State no such contract could lawfully be made.³

¹ *Arbuckle v. Reaume* (1893), 96 Mich. 243, 55 N. W. R. 808. contains an exhaustive discussion); *McKee v. Jones* (1889), 67 Miss. 405,

² See *ante*, §§ 1027–1029, 1043. 7 S. R. 348; *Brown v. Browning* (1886),

³ *O'Rourke v. O'Rourke* (1880), 43 Mich. 58, 4 N. W. R. 531; *Swann v.* 15 R. L. 422, 7 Atl. R. 403, 2 Am. St. R. 908.

Swann (1884), 21 Fed. R. 299 (which

BOOK IV.

OF THE PERFORMANCE OF THE CONTRACT.

CHAPTER I.

OF PERFORMANCE IN GENERAL.

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| <p>§ 1060. In general.</p> <p>I. WHEN PERFORMANCE IS DUE.</p> <p>1061. How this question determined.</p> <p>1062, 1063. When contract silent, circumstances must determine.</p> <p>1064, 1065. Distinguishing between condition precedent and mere agreement.</p> <p>1066. By whom determined.</p> <p>1067, 1068. Rules for determining.</p> <p>II. WHAT WILL EXCUSE PERFORMANCE.</p> <p>1069. In general.</p> <p style="padding-left: 20px;">1. <i>Waiver of Performance.</i></p> <p>1070. Party entitled may waive performance.</p> <p>1071. Elements of a waiver.</p> <p>1072. — Mere silence not a waiver.</p> <p>1073. — Mere leniency no waiver.</p> <p>1074. — Friendly attempts at adjustment no waiver.</p> <p>1075, 1076. Acceptance of part performance as waiver.</p> <p>1077. Statement of some objections as a waiver of others.</p> <p>1078, 1079. Voluntary and unconditional acceptance of deficient performance a waiver.</p> <p>1080. — Where performance due is in instalments.</p> | <p>2. <i>That the Other Party is in Default.</i></p> <p>§ 1081. Default of one party as excuse for non-performance by the other.</p> <p>1082. — Buyers failing to come or send for the goods.</p> <p>1083. — Part performance only of entire contract.</p> <p>1084-1086. — Contemporaneous acts — Default in payment.</p> <p style="padding-left: 20px;">3. <i>Renunciation of Contract.</i></p> <p>1087. Renunciation of contract by one party will excuse performance by the other.</p> <p>1088, 1089. Rights of one party when the other renounces.</p> <p>1090. — Retraction of renunciation.</p> <p>1091, 1092. Stopping performance of executory contract.</p> <p style="padding-left: 20px;">4. <i>That the Buyer has Become Insolvent.</i></p> <p>1093-1095. When buyer on credit becomes insolvent, seller may decline to perform.</p> <p style="padding-left: 20px;">5. <i>That the Other Party is Unable to Perform.</i></p> <p>1096. Buyer may repudiate where seller unable to convey title.</p> |
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6. *That the Other Party has Disabled Himself to Perform.*

§ 1097. Effect of disabling one's self to perform.

7. *Impossibility of Performance.*

1098. In general.

1099. Legal impossibility excuses.

1100-1102. Physical impossibility excuses.

1103, 1104. Mere inability of party does not excuse.

1105. Unexpected expense does not excuse.

8. *Prevention of Performance.*

§ 1106. Prevention by one party equivalent to performance by the other.

1107. — After part performance.

III. WHAT CONSTITUTES PERFORMANCE.

1108. In general.

1. *Performance by the Seller.*

1109. Of performance by the seller in general.

2. *Performance by the Buyer.*

1110. Of performance by the buyer in general.

§ 1060. **In general.**— If the contract of sale is not for any cause avoided it must be performed by both parties. It remains next to consider this subject of performance, and for the present purpose it may, perhaps, be profitably considered under three heads: I. When performance is due. II. What will excuse performance; and III. What constitutes performance.

I.

WHEN PERFORMANCE IS DUE.

§ 1061. **How this question is determined.**— The question when performance of the contract by either party is due, is one which presents a variety of aspects. It may be that the contract is so explicit upon the subject as to leave no room for doubt, and where the parties make their meaning clear they may make any lawful arrangement which pleases them. Thus, for example, though payment is usually to be contemporaneous with or subsequent to the delivery of the goods, the parties may stipulate for payment in advance.

§ 1062. **When contract silent, circumstances must determine.**— Where, however, the contract is silent, then the question must be determined by the evident intention of the parties as it can be gathered from their acts and the surrounding cir-

cumstances. Many illustrations have already been seen in various connections. Thus, where the contract is silent, it has been seen that payment and delivery are to be deemed concurrent acts, and neither party is bound to do his part, unless the other is contemporaneously ready to perform on his side. But the cases are perhaps more numerous wherein the seller is to take the initiative. Thus, where the seller is to do something to or with the goods before delivery or before the title passes, there can ordinarily be no occasion for the buyer to do anything until the seller has performed.

§ 1063. —. So where the contract is executory, and the seller is to appropriate goods to it, or is to send the goods by carrier, and the like, the same result would ensue. So where the seller is to manufacture the goods, the production of them, and notice of that fact to the buyer, must usually precede any duty of action on the part of the latter. And so, where goods are to be supplied of a certain kind, at a certain place or time in a given amount, all these things are conditions precedent to the buyer's liability. Other illustrations will readily suggest themselves.

§ 1064. **Distinguishing between condition precedent and mere agreement.**—The difficulty constantly presenting itself is to distinguish between those undertakings which the parties have intended to make conditions precedent, and those independent stipulations whose non-performance will simply give rise to an action for damages. If the given undertaking is a condition precedent, the party who is to perform it must do so before he can call upon the other to perform, and his non-performance will justify the latter in repudiating the whole contract. If, on the other hand, it is an independent stipulation or a mere warranty, its performance is not necessarily a condition precedent, and its non-performance gives rise to an action for damages merely without terminating the entire contract.

§ 1065. —. The parties may by clear declaration make that a condition precedent which the law would not otherwise so regard; or they may treat that as subsidiary which the law would otherwise regard as of primary importance. As stated by Blackburn, J., “Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently express such an intention, it will not be a condition precedent.”¹

§ 1066. **By whom determined.**—Where the contract is in writing or the facts are not disputed, the question whether a given stipulation was a condition precedent is usually for the court; but in other cases the intention of the parties, under the facts and circumstances of the cases, is a question for the jury.

§ 1067. **Rules for determining.**—Numerous attempts have been made to frame rules to aid in determining the intention of the parties. Mr. Benjamin² has stated them thus: .

“1. Where a day is appointed for doing any act, and the day *is* to happen or *may* happen before the promise by the other party is to be performed, the latter may bring action before performance, which is not a condition precedent: *aliter*, if the day fixed is to happen after the performance, for then the performance is deemed to be a condition precedent.

“2. When a covenant or promise goes only to *part* of the consideration, and a breach of it may be paid for in damages, it is an independent covenant, not a condition.

“3. Where the mutual promises go to the *whole* consideration on both sides, they are mutual conditions precedent, formerly called ‘dependent conditions.’

“4. Where each party is to do an act at the same time as the

¹ In *Bettini v. Gye* (1876), 1 Q. B. Div. 183.

² Benjamin on Sale, § 562.

other — as where goods in a sale for cash are to be delivered by the vendor, and the price to be paid by the buyer,—these are concurrent conditions, and neither party can maintain an action for breach of contract without averring that he performed or offered to perform what he himself was bound to do.

“5. Where from a consideration of the whole instrument it is clear that the one party relied upon his remedy, and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent.”

§ 1068. —. Rules of this sort, however, prove often of little value, and it is always to be remembered that they are designed to be mere aids in discovering intention and not fixed rules to control it. The rule must, therefore, always give way to clear evidence of a contrary intention; and, after all that can be said, the final test is, What did these parties intend in this case?

II.

WHAT WILL EXCUSE PERFORMANCE.

§ 1069. **In general.**—The excuses for performance which may arise are, of course, exceedingly numerous; but those most likely to occur may in general be grouped under the following heads:

1. That performance has been waived.
2. That the other party is in default.
3. That the other party has renounced the contract.
4. That the buyer has become insolvent.
5. That the other party is unable to perform.
6. That the other party has disabled himself to perform.
7. That performance has become impossible.
8. That the other party has prevented performance.

1. *Waiver of Performance.*

§ 1070. **Party entitled may waive performance.**—The contract of sale being composed of mutual obligations inuring to

the benefit of the respective parties, the parties may at any time by mutual agreement waive or surrender part or all of their respective rights.

One party alone, to whom the performance of some obligation is owing by the other, may also waive or surrender the performance of that obligation either entirely, or in respect of the time, place, manner or extent of its fulfillment.

When both parties mutually waive their rights, the surrender by one will furnish a sufficient consideration for the surrender by the other.¹ But where one party alone is to waive his right, there must either be some new consideration for it, or some circumstance working an estoppel against him.²

§ 1071. Elements of waiver.—A waiver is the voluntary and intentional relinquishment of a known right. It “implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon.”³ To constitute a waiver, therefore, the acts relied upon must have been intentionally done with knowledge of the facts, and the party acting must have been in such a situation of freedom to choose that his relinquishment can fairly be said to have been voluntary. What one does in a dilemma, forced upon him by the default of the other, cannot be counted upon as a waiver.⁴

§ 1072. — Mere silence not a waiver.—The mere fact that one to whom performance is due keeps silent respecting the breach does not necessarily constitute a waiver of it. There may be nothing to say, and “mere silence does not amount to a waiver of the performance of a condition unless, indeed, in cases where such silence is inconsistent with any other explanation.”⁵

¹ *Bryant v. Thesing* (1895), 46 Neb. 244, 64 N. W. R. 967.

² See *Ripley v. Ætna Ins. Co.* (1864), 30 N. Y. 136, 164, 86 Am. Dec. 362; *Belknap v. Bender* (1878), 75 N. Y. 446, 453, 31 Am. R. 476.

³ *Warren v. Crane* (1883), 50 Mich. 300, 15 N. W. R. 465.

⁴ *Industrial Works v. Mitchell* (1897), 114 Mich. 29, 72 N. W. R. 25; *Ramsey v. Tully*, 12 Ill. App. 463; *Northwestern Cordage Co. v. Rice* (1896), 5 N. Dak. 432, 67 N. W. R. 298, 57 Am. St. R. 563.

⁵ Per *Dillon, J.*, in *Burlington, etc. R. Co. v. Boestler* (1864), 15 Iowa, 555

§ 1073. — **Mere leniency no waiver.**— So mere leniency on the part of him to whom the act is due — mere voluntary indulgence in not insisting at once upon performance — does not constitute a waiver. “It cannot be justly construed as a permanent waiver [of the default], or as implying any agreement to waive it, or to continue the same indulgence for the time to come.”¹

§ 1074. — **Friendly attempts at adjustment no waiver.** Again, the mere fact that the party entitled has attempted by offers or proposals, not accepted, to adjust the matter, or make new arrangements, or vary the terms, does not constitute a waiver of the default or rob him of any of the rights which have accrued to him thereby under the contract.²

§ 1075. **Acceptance of part performance as waiver.**—“Although conditions precedent must be performed, and a partial performance is not sufficient,” it is said,³ “yet when a con-

[citing *Gray v. Blanchard*, 8 Pick. (Mass.) 283; *Jackson v. Crysler*, 1 Johns. Cas. (N. Y.) 125; *Lawrence v. Gifford*, 17 Pick. (Mass.) 366]. See also *Titus v. Glens Falls Ins. Co.* (1880), 81 N. Y. 419.

¹ *Wilkinson v. Blount Mfg. Co.* (1897), 169 Mass. 374, 47 N. E. R. 1020 [citing *Thompson v. Knickerbocker Ins. Co.*, 104 U. S. 252, 259; *Bleecker v. Smith*, 13 Wend. 530, 534; *Williams v. Dakin*, 22 Wend. 201, 209; *Hunter v. Daniel*, 4 Hare, 420; *Muston v. Gladwin*, 6 Q. B. 953; *Flower v. Peck*, 1 B. & A. 428].

In *Royal v. Aultman-Taylor Co.* (1889), 116 Ind. 424, 19 N. E. R. 202, 2 L. R. A. 526, it is said: “While a condition may be waived by a party who has the right to avail himself of it, mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver unless some element of estoppel can be

invoked. *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115, and cases cited.”

² *Riendeau v. Bullock* (1895), 147 N. Y. 269, 41 N. E. R. 561. Here plaintiff contracted to sell to defendant all his ice then stored on a canal, to be delivered on canal boats during June and July. For an advance of twenty-five cents per ton the time was extended through August. Considerable ice remained at the end of August, and plaintiff wrote defendant proposing to charge only twenty-five cents extra for ice taken after September 10th. Defendant refused this, and told plaintiff to sell elsewhere. *Held*, that the offer was no waiver of the terms of the contract.

³ *Wiley v. Athol* (1890), 150 Mass. 426, 23 N. E. R. 311 [citing *White v. Beeton*, 7 H. & N. 42; *Behn v. Burness*, 3 B. & S. 751; *Jonassohn v. Young*, 4 B. & S. 296; *Pust v. Dowie*,

tract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect of the defective performance."

§ 1076. — So, where the question was as to the liability of the buyers to pay for a portion of a quantity of glass contracted for, where the residue was not delivered, the court said: "While the defendants were not bound to accept a delivery of a portion of the boxes of glass, and had a right to reject or retain the same as they saw fit, yet if they elected to receive the part delivered, appropriated the same to their own use, and by their acts evinced that they waived this condition, they became liable to pay for what was actually delivered. This rule is established in numerous reported cases, and the question of waiver is frequently one of fact to be determined by the circumstances and the evidence."¹

§ 1077. Statement of some objections as a waiver of others.

While a party is not ordinarily obliged to insist upon all the defenses which he has, or to specify all the particulars in respect to which he claims default,² still, when a formal category of objections is presented, it is to be expected that those will be mentioned upon which the party insists. "The principle is plain, and needs no argument in support of it, that if a particular objection is taken to the performance and the party is silent as to all others, they are deemed to be waived. This

5 B. & S. 20; *Carter v. Scargill*, L. R. 10 Q. B. 564; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, 448].

¹ *Avery v. Willson* (1880), 81 N. Y. 341, 37 Am. R. 503.

² Thus, in *Bryant v. Thesing* (1895), 46 Neb. 244, 64 N. W. R. 967, it was

held that the fact that the buyer refused the goods, when tendered, on the ground that the contract had been canceled, did not preclude him from defending on the ground that the goods tendered did not conform to the description in the contract.

waiver of all other objections is not only justly inferable generally, but is especially so when the deliberateness with which the objections are stated leaves it to be implied that there has been a consideration of the matter, and a result reached upon particular grounds.”¹

§ 1078. Voluntary and unconditional acceptance of deficient performance a waiver.—On the other hand, where a party with full knowledge of the facts voluntarily accepts and acquiesces in a deficient performance — whether the defect be that the goods are not of the kind agreed upon, or are not delivered at the time or place, or in the manner, amount or condition specified — under circumstances indicating to the party in default that no further performance will be demanded, a waiver of the defect may be inferred.²

¹ *Littlejohn v. Shaw* (1899), 159 N. Y. 188, 53 N. E. R. 810. See also *Smith v. Pettie* (1887), 70 N. Y. 13, 17.

² Thus, where one who has contracted for a new machine voluntarily accepts one which he knows has been used, he waives objection to it on that ground. *Aultman-Taylor Mach. Co. v. Ridenour* (1896), 96 Iowa, 638, 65 N. W. R. 980. Many other similar cases are cited in the chapter on Acceptance, *post*, § 1363.

In *Brady v. Cassidy* (1895), 145 N. Y. 171, 39 N. E. R. 814, it appeared that a contract of sale was made of “the entire manufactured stock, in good condition, now on hand at foundry and store-room. As a fact part of the stock had been previously sold to others. At the time of the sale the purchasers took only that part of the stock not sold to others, acquiesced in the disposal of the remainder to such others, and assisted in its delivery to them. *Held*, that oral evidence of this conduct of the purchaser is admissible, and that such

conduct constitutes a waiver of full performance of the contract.

In *German Savings Inst. v. De La Vergne Co.* (1895), 36 U. S. App. 184, 17 C. C. A. 34, 70 Fed. R. 146, a corporation executed a bill of sale of all its property to the defendant, the De La Vergne Co., in consideration for which the latter agreed to issue \$100,000 of capital stock in the defendant company to the stockholders of the vendor corporation. Besides its property, the stock of the vendor was to be assigned to the defendant. The property was all turned over, but one-fourth of the stock certificates were assigned by the executors of a deceased owner without authority, and could not be conveyed, but there was nothing to show that they were of any value. *Held* that, as the defendant had obtained and continued to hold all the substantial benefits of the contract, he could not refuse to issue the \$100,000 of stock on the ground of failure to obtain all the stock cer-

§ 1079. —. The difficulty is in determining whether the acceptance is thus voluntary and unconditional. The party may have been put in such a situation that there is nothing left to do but to accept the performance tendered and thus make the best of a bad matter; and where this is the case his acceptance is not necessarily to be deemed a waiver.¹

tificates of the vendor corporation, nor on the ground that the instruments were not delivered in time, since this objection was not made until four months after their delivery. The delay was a waiver.

¹This is well stated in *Ramsey v. Tully* (1882), 12 Ill. App. 463, 471, as follows: "The question of waiver is largely one of intention, each case depending upon its own special facts. A voluntary acceptance, without objection, of a purchased article, where there are no compulsory circumstances necessitating such acceptance, and no special damages to be occasioned thereby, may properly be regarded as evincing an intention to waive the time specified for delivery. But where the circumstances are such as to show that the acceptance can, in no just sense, be regarded as voluntary, but rather as compulsory, the presumption of an intention to waive does not arise. Appellants were engaged in the construction of a public work, for the completion of which they had given bonds. The work was but half finished, and they could obtain brick of the requisite quality nowhere but from appellees. They notified them of their necessities and requested them to comply with their contract. To say that an acceptance, after the time for delivery had passed, under such circumstances, was voluntary in such sense as to evince an intention to waive their right to claim damages for the

delay, would be a perversion of language. They did the best they could in the situation in which they found themselves placed."

In *Northwestern Cordage Co. v. Rice* (1896), 5 N. Dak. 432, 67 N. W. R. 298, 57 Am. St. R. 563, it is said: "It often happens that the purchaser is so situated that it is necessary for him to accept the article in its defective condition. It would indeed be singular that one who had placed him in this position should be allowed to escape liability on his contract of warranty."

To like effect: *Hansen v. Kirtly* (1861), 11 Iowa, 565; *Cox v. Long* (1873), 69 N. C. 7; *Cincinnati v. Cameron* (1878), 33 Ohio St. 336; *Ketchum v. Wells* (1865), 19 Wis. 26; *Flannery v. Rohrmayer* (1879), 46 Conn. 558, 33 Am. R. 36; *Ruff v. Rinaldo* (1873), 55 N. Y. 664; *Haven v. Wakefield* (1866), 39 Ill. 509; *Waterman v. Clark* (1875), 76 Ill. 428; *Tobey v. Price* (1874), 75 Ill. 615.

In *Industrial Works v. Mitchell* (1897), 114 Mich. 29, 72 N. W. R. 25, the plaintiffs agreed to furnish and deliver certain dredge machinery by March 1, 1891. It was not delivered until March 31st, and was so badly constructed that it required fifty-six days more to get it in working order. On March 4th a cash payment of \$2,000 was made, and on April 25th, almost thirty days before the machinery was ready for work, at the demand of the seller the defendant

Whether he did voluntarily accept, or whether his acceptance was subject to a reserved right to recover damages for the default, is usually a question of fact, under all the circumstances of the case, and is to be determined by the jury.¹

§ 1080. — Where performance due in instalments.— Where performance — for example, payment — is due in instalments, and default has been made in one instalment so that a right of forfeiture has accrued to the other party, and the latter then accepts performance of the instalment in arrears, this, as has been seen in an earlier chapter,² will be deemed to be a waiver of that default, unless he then gave notice that he did not thereby intend to waive his right to terminate the contract.³

2. *That the Other Party is in Default.*

§ 1081. Default of one party as excuse for non-performance by the other.— One party to the contract may often be excused performance by reason of the fact that the other is in default. If what the other is to do is a condition precedent,— if, for example, the seller is not to make the goods until the buyer sends directions,⁴ or is not to deliver them until the buyer sends a vessel to receive them, or gives the necessary shipping instructions, or prepays the freight, and the like,— the seller cannot be in default for not delivering so long as the buyer neglects to do that which must be done before the seller's act is due.⁵

executed a note under the contract. *Held*, that his cash payment and execution of the note were not waivers of defendant's right to sue for damages for delay.

¹ *Northwestern Cordage Co. v. Rice*, *supra*, and cases cited.

² See *ante*, § 909.

³ *Wilkinson v. Blount Mfg. Co.* (1897), 169 Mass. 374, 47 N. E. R. 1020 [citing *Tuttle v. Bean*, 13 Metc. (Mass.) 275; *Collins v. Canty*, 6 Cush. (Mass.) 415; *Kimball v. Rowland*, 6 Gray

(Mass.), 224; *Miller v. Prescott*, 163 Mass. 12, 39 N. E. R. 409; *Hammacher v. Wilson*, 26 Fed. Rep. 239, 241; *Platt v. Fire Extinguisher Mfg. Co.*, 59 Fed. Rep. 897].

⁴ See *Ault v. Dustin* (1898), 100 Tenn. 366, 45 S. W. R. 981; *Hinckley v. Pittsburgh Steel Co.* (1887), 121 U. S. 264, 7 Sup. Ct. R. 875; *Mechem's Case on Damages*, 272.

⁵ See *Sedgwick v. Cottenham* (1880), 54 Iowa, 512; *Henning v. Powell* (1863), 33 Mo. 468; *Hartje v. Collins* (1863),

§ 1082. — Buyer's failure to come or send for the goods.
For this reason it has been held that where there has been a contract for the sale of unascertained goods which are to be separated and identified when the buyer comes or sends for them, his failure to so come or send at the time agreed upon justifies the seller in deeming the contract to be abandoned by the buyer, and the seller, therefore, may make other disposition of the goods.¹

§ 1083. — Part performance only of entire contract.— So, also, where the contract is entire and the party who is to do the first act — as, in the case of the seller, to apply the goods — has made default in his performance in full, — as where the seller has supplied part but not all of the goods contracted for, — the other is not obliged to treat the contract as obligatory upon himself. He may, as will be hereafter seen,² waive the full performance and become liable to pay for the part received; but he is not obliged to do so: he may treat the failure of the other to deliver all as agreed as a ground for a repudiation and rescission of the whole contract.³

§ 1084. — Contemporaneous acts — Default in payment.
So where the acts are to be contemporaneous — as payment and delivery, — if one party refuses or neglects to do his part, the other cannot be deemed in default for not performing on his side.⁴ Thus, where the contract provides for delivery and payment in full at a certain place or time, the failure of the purchaser, for example, to be ready at the time or place specified to pay all of the money as agreed upon, will justify the seller in deeming the contract at an end. He is not obliged to

46 Pa. St. 268; Kunkle v. Mitchell (1867), 56 Pa. St. 100; Weill v. American Metal Co. (1899), 182 Ill. 128, 54 N. E. R. 1050.

¹ Warren v. Buckminster (1852), 24 N. H. 336; Kitchen v. Stokes (1880), 9 W. N. Cas. (Pa.) 48.

² See *post*, § 1163.

³ Campbell Printing Press Co. v. Marsh (1894), 20 Colo. 22, 36 Pac. R. 799 [citing Norrington v. Wright, 115 U. S. 188; Husted v. Craig, 36 N. Y. 221; Norris v. Harris, 15 Cal. 226; Robinson v. Brooks, 40 Fed. R. 525; Bell v. Hoffman, 92 N. C. 273].

⁴ See *post*, § 1123.

wait longer to enable the buyer to procure the money, nor are his rights affected by a subsequent tender of the price.¹

§ 1085. —. And generally, as was said by Lord Blackburn in an English case,² “Where there is a contract in which there are two parties, each side having something to do, if you see that the failure to perform one part of it goes to the root of the contract—goes to the foundation of the whole—it is a good defense [for one] to say, ‘I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.’”

§ 1086. —. The effect of the non-performance of one instalment in a contract to be performed in instalments is considered in a later section.³

3. Renunciation of Contract.

§ 1087. **Renunciation of contract by one party will excuse performance by the other.**—Where before the time arrives for the performance of the contract by one party, the other absolutely and unqualifiedly announces that he will neither receive such performance by the former nor perform on his own part, the former may, if he desires, consider himself as absolved from his duty to perform.⁴ This renunciation by the other, however, must be more than a mere threat of non-performance, and, *a fortiori*, more than mere idle talk of not performing; it

¹Beauchamp v. Archer (1881), 58 Cal. 431, 41 Am. R. 266; Dwinel v. Howard (1849), 30 Me. 258. But the party must be really in default, and a notice of rescission given prematurely will be entirely ineffectual. Thus a purchaser who agrees to pay bills daily for goods delivered has the whole of the day upon which the bills are presented in which to make payment; and the contract

cannot be rescinded in the afternoon of any day for failure to pay bills presented that day. Anglo-American Provision Co. v. Prentiss (1895), 157 Ill. 506, 42 N. E. R. 157.

²In Mersey Steel & Iron Co. v. Naylor (1884), 9 App. Cas. 434.

³Post, §§ 1140 *et seq.*

⁴King v. Faist, 161 Mass. 449, 37 N. E. R. 456; Ballou v. Billings, 136 Mass. 307.

must be a distinct, unequivocal and absolute refusal to receive performance or to perform on his own part.¹

§ 1088. Rights of one party when the other renounces.—It of course does not lie within the power of one party to put an end to the contract without the consent of the other, though the latter, if he will, may acquiesce in its present termination, and pursue his remedies as upon a present breach. The rights and remedies of the party receiving such a notice of renunciation were well stated by Cockburn, C. J., in an English case² as follows: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance;³ but in that case he keeps the contract alive for the benefit of the other party as well as his own: he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any

¹ *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. R. 850. A mere request acquiesced in is not enough. *McGregor v. Ross*, 96 Mich. 103, 55 N. W. R. 658. See also *Edward Hines Lumber Co. v. Alley* (1896), 43 U. S. App. 169, 73 Fed. R. 603, 19 C. C. A. 599.

² *Frost v. Knight*, L. R. 7 Ex. 111, approved and quoted in *Johnstone v. Milling*, 16 Q. B. Div. 460.

³ The option to treat the renunciation as a present breach is one resting, not with the renouncing party, but with the other. The former cannot *force* the latter into the present action for its breach. This is well stated in a late case in Illinois: "Where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach

and bring his action, or he may decline to accept such notice as a breach, and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. One party to a contract cannot, by simply refusing to carry out his part of it, compel the other to rescind it. The latter has a right to keep it alive notwithstanding such refusal." *Roebeling Sons' Co. v. Lock Stitch Fence Co.* (1889), 130 Ill. 660, 22 N. E. R. 518. To same effect: *Kadish v. Young* (1883), 108 Ill. 170, 48 Am. R. 548; *Mechem's Cas. on Damages*, 265; *Leigh v. Patterson*, 8 Taunt. 540; *Phillpotts v. Evans*, 5 M. & W. 475. See also *Anglo-American Provision Co. v. Prentiss* (1895), 157 Ill. 506, 42 N. E. R. 157.

supervening circumstance which would justify him in declining to complete it;¹ on the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

§ 1089. — This doctrine is well settled in England,² and is adopted by the majority,³ though not by all,⁴ of the American courts. It is also approved in a very recent case before the

¹ This point was well illustrated in *Avery v. Bowden*, 5 El. & Bl. 714, and *Reid v. Hoskins*, id. 729, 85 Eng. Com. L. 727. Here there had been notice of renunciation, but the other party refused to accept or act upon it, but insisted on performance. While affairs were in this attitude an event occurred — namely, the breaking out of war — which put an end to the contract, and the court held there could be no recovery. The plaintiffs, said the court, if they had an option, "were bound to exercise it; they could not both hold the defendant to the prospective performance of the contract and at the same time say that it was renounced."

² The right to regard the renunciation as a present breach within the limits stated in the text is well settled by the English cases (*Hochster*

v. De la Tour, 2 El. & Bl. 678; *Danube & Black Sea Co. v. Xenos*, 13 Com. B. (N. S.) 825; *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Milling*, 16 Q. B. Div. 460; *Avery v. Bowden*, *supra*; *Reid v. Hoskins*, *supra*; *Barwick v. Buba*, 2 C. B. (N. S.) 563, and in Canada. *Dalrymple v. Scott*, 19 Ont. App. 477.

³ It is also approved by the majority of the American courts. *Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. R. 208; *McCormick Mach. Co. v. Markert* (1899), 107 Iowa, 340, 78 N. W. R. 33; *Fox v. Kitton*, 19 Ill. 519; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Kadish v. Young*, 108 Ill. 170, 48 Am. R. 548; *Roebbling Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. R. 518; *Lake Shore, etc. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. R. 773,

⁴ It was denied in *Massachusetts* (*Daniels v. Newton* (1874), 114 Mass. 530, 19 Am. R. 384. But see *Collins v. Delaporte*, 115 Mass. 159; *Parker v. Russell*, 133 Mass. 74; *Ballou v. Billings*, 136 id. 307; *Lowe v. Harwood*, 139 id. 133; *Paige v. Barrett*,

151 id. 67; *Riley v. Hale*, 158 id. 240), in *North Dakota* (*Stanford v. McGill* (1897), 6 N. Dak. 536, 72 N. W. R. 938, 38 L. R. A. 760); and in *Nebraska*. *King v. Waterman* (1898), 55 Neb. 324, 75 N. W. R. 830

supreme court of the United States,¹ in which all of the authorities are reviewed, and the doctrine as laid down in the English case of *Hochster v. De la Tour* adopted and applied.

30 L. R. A. 33; Dugan v. Anderson, 36 Md. 567, 11 Am. R. 509; Eckenrode v. Chemical Co., 55 Md. 51; Pancake v. Campbell (1897), 44 W. Va. 82, 28 S. E. R. 719; Davis v. Grand Rapids School Furniture Co. (1896), 41 W. Va. 717, 24 S. E. R. 630; Burtis v. Thompson, 42 N. Y. 246, 1 Am. R. 516; Howard v. Daly, 61 N. Y. 363, 19 Am. R. 285; Ferris v. Spooner, 102 N. Y. 10, 5 N. E. R. 773; Stokes v. Mackay (1895), 147 N. Y. 223, 41 N. E. R. 496; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. R. 436; Hosmer v. Wilson (1859), 7 Mich. 294, 74 Am. Dec. 716; Platt v. Brand (1872), 26 Mich. 173; Cobb v. Hall (1860), 33 Vt. 233; Zuck v. McClure (1881), 98 Pa. St. 541; Hocking v. Hamilton (1893), 158 Pa. St. 107, 27 Atl. R. 836; Smiley v. Barker (1897), 55 U. S. App. 125, 83 Fed. R. 684, 28 C. C. A. 9.

¹ Roehm v. Horst (1900), 178 U. S. 1, 44 L. ed. 1, affirming 91 Fed. R. 345, 63 U. S. App. 520, 33 C. C. A. 550.

The opinion of the circuit court of appeals stated the case thus:

"In August, 1893, Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific coast hops, to be delivered at various dates in the future, at an uniform price of twenty-two cents per pound. Of the whole quantity six hundred bales had been delivered, accepted and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. These were deliverable at the rate of twenty bales per month during each month

from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation, and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months or one season. They all bear the same date and are similar as regards the quantity of hops to be delivered and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made. In June, 1896, the firm of Horst Brothers was dissolved by the retirement of Paul R. G. Horst. He assigned his interest in the Roehm contract to the remaining partners, who continued the business under the same firm name. Roehm, the defendant below, was notified of this dissolution of the firm and of the transfer of Paul R. G. Horst's interest in the contract to its successors. He thereupon gave notice to the firm that he considered his contract canceled thereby. Subsequently the firm of Horst Brothers advised the defendant of their ability and willingness to perform the contract, and under date of September 4, 1896, wrote Roehm as follows:

"Dear Sir: Will you please write us whether you wish us to ship the hops under your contract direct to your city? The contract calls for delivery in New York, and as we ship direct from this coast we can ship to either city at same rate. Consequently there will be a saving to you

§ 1090. — Retraction of renunciation.— As stated, however, in the rule quoted, the other party is not bound to treat

of freight if we ship to your city direct from here. Awaiting your reply, we are, Very truly,

“‘HORST BROTHERS.’

“To this letter Roehm replied, under date of September 14, 1896:

“‘Dear Sirs: In response to your letters dated 3d and 4th inst., state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

“‘Very truly,

“‘JOHN ROEHM.’

“On October 9, 1896, Horst Brothers advised Roehm of the shipment of twenty bales of hops for the October delivery, as called for by the contract, which Roehm, by telegraph, refused to receive, and as supplementary thereto sent the following letter, dated October 24, 1896:

“‘Gentlemen: Yours of October 9, inclosing bill of lading and bill of particulars per twenty bales of hops forwarded me under the terms of contract of August 25, 1893, was received, and I have wired you that I decline to receive the same. I notified you under date of June 27, 1896, that, owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end, and will make arrangements for purchasing my supplies elsewhere. I am advised that I am under no obligations by that contract to accept supplies from you. If you desire to bill these goods at the current market rate under a new contract, I will accept them if upon inspection they

are of the quality desired; otherwise they will remain at the freight station subject to your order.

“‘Very truly yours,

“‘JOHN ROEHM.’

“No further efforts were made by Horst Brothers to make delivery under the contract, but in January, 1897, this action was begun by all the original parties thereto, to the use of the firm as at present constituted, to recover damages for its breach. Judgment was rendered in favor of the plaintiffs.”

Mr. Chief Justice Fuller delivered the opinion of the court:

“It is conceded that the contracts set out in the findings of facts were four of ten simultaneous contracts, for one hundred bales each, covering the furnishing of one thousand bales of hops during a period of five years, of which six hundred bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for one thousand bales, the breach alleged would have occurred while the contract was in the course of performance; but plaintiffs’ declaration or statement of demand averred the execution of the four contracts, ‘two for the purchase and sale of Pacific coast hops of the crop of 1896, and two for the purchase and sale of Pacific coast hops of the crop of 1897,’ set them out *in extenso*, and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts, the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to

the notice of renunciation as operative. He may elect to keep the contract open, but if he does so he does it for the benefit

the other three contracts was the refusal to perform before the time for performance had arrived.

"The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

"It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the

refusal as a breach of the entire contract and recover accordingly.

"And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. 1212, 1220, 9th edition by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to.

"In *Hochster v. De la Tour*, 2 El. & Bl. 678, plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June 1st, on certain terms. On the 11th of May defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, and on May 22d, plaintiff brought an action at law for breach of contract in that defendant, before the said 1st of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that, as there could be a breach of contract before the time fixed for performance, a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

"In the course of the argument,

of both; and he is precluded from afterwards treating it as a breach. The party attempting to renounce may withdraw his

Mr. Justice Crompton observed: 'When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.'

"In delivering the opinion of the court (Campbell, C. J., Coleridge, Erle and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said:

"'But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of re-

maining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August, 1852; according to decided cases, the action might have been brought before the 1st June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately

renunciation and have the contract performed.¹ If, however, the other has treated the renunciation as a breach, the party

sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer. An argument against the action before the 1st June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case.'

"In *Frost v. Knight*, L. R. 7 Exch. 111, defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the exchequer chamber, overruling the decision of the court of exchequer (L. R. 5 Exch. 322), that for this breach an action was well brought during the father's life-time. Cockburn, C. J., said: 'The law with reference to a contract to be performed at a future time, where the

party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, 2 El. & Bl. 678, and the *Danube & B. S. Railway & K. Harbour Co. v. Xenos*, 13 C. B. (N. S.) 825, on the one hand, and *Avery v. Bowden*, 5 El. & Bl. 714; *Reid v. Hoskins*, 6 El. & Bl. 953, and *Barrick v. Buba*, 2 C. B. (N. S.) 563, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circum-

¹*Stokes v. Mackay* (1895), 147 N. Y. 223, 41 N. E. R. 496. Unless, as in *Ault v. Dustin*, *post*, he withdraws

his renunciation so late that the other cannot then perform.

renouncing is not at liberty to withdraw his renunciation and offer to perform the contract, although the time appointed for actual performance may not have arrived.¹

stances which may have afforded him the means of mitigating his loss.'

"The case of *Danube & B. S. Railway & K. Harbour Co. v. Xenos*, 11 C. B. (N. S.) 152, is stated in the headnotes thus: On the 9th of July, A, by his agent, agreed to receive certain goods of B on board his ship to be carried to a foreign port, the shipment to commence on the 1st of August. On the 21st of July A wrote to B, stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again, offering a substituted contract, but still repudiating the original contract. B, by his attorneys, gave A notice that he should hold him bound by the original contract, and that, if he persisted in refusing to perform it, he (B) should forthwith proceed to make other arrangements for forwarding the goods to their destination and look to him for any loss. On the 1st of August A again wrote to B, stating that he was then prepared to receive the goods on board his ship, making no allusion to the original contract. B had, however, in the meantime, entered into a negotiation with one S for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S on the 2d of August. B thereupon sued A for refusing to receive the goods pursuant to his contract, and A

brought a cross-action against B for refusing to ship. Upon a special case stating these facts, *held*, that it was competent to A to treat B's renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross-action of A, and sustained B's plea that before breach A discharged him from the performance of the agreement.

"Erle, C. J., said (p. 175): 'In *Cort v. Ambergate, N. & B. & E. Junction R. Co.*, 17 Q. B. 127, it was held that, upon the company giving notice to Mr. Cort that they would not receive any more of his chairs, he might abstain from manufacturing them and sue the company for the breach of contract without tendering the goods for their acceptance. So, in *Hochster v. De la Tour*, 2 El. & Bl. 678, it was held that the courier whose services were engaged for a period to commence from a future day, being told before that day that they would not be accepted, was at liberty to treat that as a complete breach and to hire himself to another party. And the boundary is equally well ascertained on the other side. Thus, in *Avery v. Bowden*, 5 El. & Bl. 714, 6 El. & Bl. 953, where the agent of the charterer intimated to the captain that, in consequence of the breaking out of the war, he would be unable to furnish him with a cargo, and wished the captain to sail away, and the latter did not do so, it was not to fall within

¹ *Ault v. Dustin* (1897), 100 Tenn. 366, 45 S. W. R. 981 (quoting Keener's *Selections on Contracts*, II, p. 924);

Johnstone v. Milling, L. R. 16 Q. B. Div. 460.

§ 1091. Stopping performance of executory contract.— Questions of a similar kind arise where, pending the perform-

the principle already adverted to, and not to amount to a breach or renunciation of the contract. But where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action.'

"The case was heard on error in the exchequer chamber before Cockburn, C. J., Pollock, C. B., Wightman, J., Crompton, J., Channell, B., and Wilde, B.; and the judgment of the common pleas was unanimously affirmed. 13 C. B. (N. S.) 825.

"In *Johnstone v. Milling*, L. R. 16 Q. B. Div. 467, Lord Esher, Master of the Rolls, puts the principle thus: 'When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.'

"Lord Justice Bowen said (p. 472): 'We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect it becomes a breach of contract and he can recover upon it as such.'

"The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the precise point has not been ruled by this court.

"In *Smoot's Case*, 15 Wall. 36, 48, *sub nom.* *United States v. Smoot*, 21 L. ed. 107, 110, Mr. Justice Miller observed: 'In the case of *Phillpotts v. Evans*. 5

ance by one party of an executory contract, the other peremptorily directs its discontinuance and announces that he will not

Mees. & W. 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was whether the measure of damages should be governed by the price of the wheat at the time of the notice or at the time of the tender. Baron Parke said: "I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept." And though some of the judges in the subsequent case of *Hochster v. De la Tour*, 2 El. & Bl. 678, disapprove very properly of the extreme ground taken by Baron Parke, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff.'

"In *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. R. 390, a life insurance company had terminated its business and transferred its assets and policies to another company, and the court held that this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the insurance company, to wit, the death of the insured, had not

arrived. Mr. Justice Bradley, delivering the opinion of the court, said: 'Our third conclusion is that, as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby.'

"In *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. R. 850, it was held that the case did not come within the rule laid down in *Hochster v. De la Tour*, but within *Avery v. Bowden* and *Johnstone v. Milling*, since, in the view entertained by the court, there was not a renunciation of the contract by a total refusal to perform.

"So in *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264, 30 L. ed. 920, 923, 7 Sup. Ct. R. 882, involving a contract for the delivery of iron ore, the court said: 'The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice previously given by the defendant to the plaintiff, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiffs as a renunciation

receive performance; as where, for example, goods have been ordered to be manufactured, and during the process of their

and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such.'

"In *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. R. 876, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: 'Whenever one party thereto is guilty of such a breach as is here attributed to the defendant the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.'

"In *Pierce v. Tennessee Coal, I. & R. Co.*, 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. R. 335, it was held that on discharge from a contract of employment the party discharged might elect to treat the contract as absolutely and finally broken, and in an action recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past, deducting any sum that he might have earned or that he might thereafter earn; and Mr. Justice Gray said: 'The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to successive actions for damages from time to time; or to

leave the whole of his damages to be recovered by his personal representatives after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract.'

"In *Hancock v. New York L. Ins. Co.*, Fed. Cas. No. 6,011, *Hochster v. De la Tour* was followed by Bond, J., in the circuit court for the eastern district of Virginia; and in *Grau v. McVicker*, 8 Biss. 13, Fed. Cas. No. 5,708, Drummond, J., fully approved of the principles decided in that case, and remarked: 'It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterwards, or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages.'

"Again, in *Dingley v. Oler*, 11 Fed. R. 372, Lowell, J., applied the rule in the circuit court for the district of Maine, and, after citing *Hochster v. De la Tour*, *Frost v. Knight*, and other cases, said: 'These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.' And see *Foss-Schneider Brewing Co. v. Bullock*, 16 U. S. App. 311, 59 Fed. R. 83, 8 C. C. A. 14; *Edward Hines Lumber Co. v. Alley*, 43 U. S. App. 169, 73 Fed. R. 603, 19 C. C. A. 599; *Marks v. Van Eeghen*, 57 U. S. App. 149, 85 Fed. R. 853, 30 C. C. A. 208.

"The great weight of authority in

manufacture, but before completion, the order is positively countermanded; or where goods have been ordered from a

the State courts is to the same effect, as will appear by reference to the cases cited in the margin. (*Fox v. Kitton*, 19 Ill. 518; *Kadish v. Young*, 108 Ill. 170, 48 Am. R. 548; *John A. Roebling's Sons' Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N. E. R. 518; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. R. 773; *Burtis v. Thompson*, 43 N. Y. 246, 1 Am. R. 516; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. R. 436; *Mountjoy v. Metzger*, 9 Phila. 10; *Zuck v. McClure*, 98 Pa. St. 541; *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. R. 836; *Dugan v. Anderson*, 36 Md. 567, 11 Am. R. 509; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 173; *Crabtree v. Messersmith*, 19 Iowa, 179; *McCormick v. Basal*, 46 Iowa, 235; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. R. 275; *Cobb v. Hall*, 33 Vt. 233; *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. R. 630; and other cases cited in the text-books and encyclopædias.)

"On the other hand, in *Greenway v. Gaither*, Taney, 227, Fed. Cas. No. 5,788, Mr. Chief Justice Taney, sitting on circuit in Maryland, declined to apply the rule in that particular case. The cause was tried in November, 1851, and more than two years after, at November term, 1853, application was made to the chief justice to seal a bill of exceptions. *Hochster v. De la Tour* was decided in June, 1853, and the decision of the circuit court had apparently been contrary to the rule laid down in that case. The chief justice refused to seal the bill, chiefly on the ground that under the circumstances the application came

too late, but also on the ground that there was no error, as the rule was only applicable to contracts of the special character involved in that case, and the chief justice said as to the contract in hand, by which defendant engaged to pay certain sums of money on certain days: 'It has never been supposed that notice to the holder of a bond or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived.'

"The rule is disapproved in *Daniels v. Newton*, 114 Mass. 530, and in *Stanford v. McGill*, 6 N. D. 536, 38 L. R. A. 760, 72 N. W. R. 938, on elaborate consideration. The opinion of Judge Wells in *Daniels v. Newton* is generally regarded as containing all that could be said in opposition to the decision of *Hochster v. De la Tour*, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note or a bond, the consideration has passed: there are no mutual obligations; and cases of that sort do not fall within the reason of the rule.

"In *Nichols v. Scranton Steel Co.*, 137 N. Y. 487, 33 N. E. R. 566, Mr. Justice Peckham, then a member of the court of appeals of New York, thus expresses the distinction: 'It is

wholesale dealer, but before shipment or other appropriation the order is recalled. In respect of these cases the law is well

not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal.

"We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

"The other proposition on which the case of *Daniels v. Newton* was rested is that until the time for performance arrives neither contract-

ing party can suffer any injury which can form a ground of damages. Wells, J., said: 'An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action.'

"But there are many cases in which, before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in *Daniels v. Newton*, though it is not there in terms decided 'that an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.' *Parker v. Russell*, 133 Mass. 74.

"In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in course of performance, and it is said that before

settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has

the argument on the ground of convenience and mutual advantage to the parties can properly have weight, 'the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case.'

"We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus penitentiae* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for a commencement of performance?

"As Lord Chief Justice Cockburn observed in *Frost v. Knight*, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. While, by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract.

"During the argument of *Cort v. Ambergate, N. & B. & E. Junction R. Co.*, 17 Q. B. 127, Erle, J., made this suggestion: 'Suppose the contract was that plaintiff should send a ship to a certain port for cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo; must the ship be sent to return empty?' And if it was not necessary for the ship-owner to send his ship, it is not perceived why he should be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract.

"If in this case these ten hop contracts had been written into one con-

sustained by reason of having his performance checked at that stage in its progress.¹

§ 1092. —. The contract is not rescinded, but broken; and while the other party has the right to deem it in force for the purpose of the recovery of his damages, he is under no obligation, for that purpose, to tender complete performance,² nor has

tract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in *Hochster v. De la Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day."

¹ *Davis v. Bronson* (1891), 2 N. D. 300, 33 Am. St. R. 783, 16 L. R. A. 655, 50 N. W. R. 836; *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. R. 756; *Clark v. Marsiglia*, 1 Denio (N. Y.), 317, 43 Am. Dec. 670; *Danforth v. Walker*, 37 Vt. 239, 40 Vt. 257; *Moline Scale Co. v. Beed*, 52 Iowa, 307, 3 N. W. R. 96, 35 Am. R. 272; *Butler v. Butler*, 77 N. Y. 472, 33 Am. R. 648; *Collins v. Delaporte*, 115 Mass.

159; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. R. 788, 18 Atl. R. 1058; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Derby v. Johnson*, 21 Vt. 17; *Ault v. Dustin* (1897), 100 Tenn. 366, 45 S. W. R. 981.

² In *Cort v. Ambergate, etc. Ry. Co.*, 17 Q. B. 127, 79 Eng. Com. L. 126, Lord Campbell, C. J., says: "We think we are justified, on principle and without trenching on any former decision, in holding that, when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract." To same effect: *Hosmer v. Wilson*, *supra* [followed in *Platt v. Brand* (1872), 26 Mich. 137]; *Walsh v. Myers* (1896), 92 Wis. 397, 66 N. W. R. 250; *Farwell v. Solomon* (1898), 170 Mass. 457, 49 N. E. R. 738; *Clement & Hawkes Manufacturing Co. v. Meserole* (1871), 107 Mass. 362; *Eckenrode v. Canton Chemical Co.* (1880), 55 Md. 51; *Textor & Bro. v. Hutchings* (1884),

he the right to unnecessarily enhance the damages by proceeding, after the countermand, to finish his undertaking.¹ His remedy will be an action for the breach of the contract, and not for goods sold or for labor and materials; and he is entitled to pursue his remedy at once, the direction of the defendant not to proceed being equivalent, for this purpose, to an absolute physical prevention by the defendant.²

4. *That the Buyer has Become Insolvent.*

§ 1093. When buyer on credit becomes insolvent seller may decline to perform.—Analogous to the cases referred to in the preceding subdivision are those in which the buyer be-

62 Md. 150; McCormick v. Basal (1877), 46 Iowa, 235; Zuck v. McClure (1881), 98 Pa. St. 541; Windmuller v. Pope (1887), 107 N. Y. 674, 14 N. E. R. 436; Haines v. Tucker (1870), 50 N. H. 307.

¹ Hosmer v. Wilson (1859), 7 Mich. 294, 74 Am. Dec. 716; Danforth v. Walker (1864), 37 Vt. 239; Dillon v. Anderson (1870), 43 N. Y. 231; Unexcelled Fire Works Co. v. Polites (1890), 130 Pa. St. 536, 17 Am. St. R. 788, 18 Atl. R. 1058.

² Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Moline Scale Co. v. Beed, 52 Iowa, 307, 3 N. W. R. 96, 35 Am. R. 272; Butler v. Butler, 77 N. Y. 472, 33 Am. R. 648; Allen v. Jarvis, 20 Conn. 38.

In Unexcelled Fire Works Co. v. Polites (1890), 130 Pa. St. 536, 17 Am. St. R. 788, 18 Atl. R. 1058, it appeared that early in the year defendant had ordered a quantity of fireworks from plaintiff, the manufacturer, to be subsequently shipped. After the manufacturer had gotten his stock manufactured, but before any particular goods had been appropriated to this order, defendant countermanded it.

Plaintiff replied that nevertheless the goods would be shipped in pursuance of the contract. They were so shipped; the defendant refused to receive them; the carrier refused to retain them in its possession, and plaintiff took them back and placed them in storage subject to the defendant's order. The action was to recover the price. Said the court: "It is plain that the notice given to the plaintiffs by the defendant not to ship the goods was a repudiation of the contract; it was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk and set apart to the defendant; the direction not to ship was a revocation of the carrier's agency to receive; and the plaintiffs thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant. The plaintiffs made the carrier their agent for delivery, but the goods were in fact not delivered.

comes insolvent before the time for the delivery of the goods. Not now referring to the matter of the seller's lien,—which is discussed in a later chapter,—it is said to be the rule that “the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered.”¹

§ 1094. —. The insolvency of the buyer does not of itself, of course, rescind the contract; and, if the buyer or those who represent him tender the price, the seller would be bound to deliver. But where the buyer or his representative does not thus indicate an intention to go on with the contract, the seller may treat it as an abandonment or renunciation on the part of the buyer, and therefore as a ground for rescission on his part.²

§ 1095. —. But while the seller *may* thus treat the contract as rescinded, he is not obliged to do so, but may insist upon its performance. He must, however, in this event show that he tendered performance in accordance with the contract,³ including even, it is said, the delivery upon credit as agreed.⁴

5. *That the Other Party is Unable to Perform.*

§ 1096. **Buyer may repudiate where seller unable to convey title.**—The fact that one party is entirely unable to perform his undertaking may be a sufficient justification to the other for

A delivery was tendered by the carrier when the goods arrived at their destination, but they were not received. The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered.”

¹ Ex parte Chalmers (1873), L. R. 8 Ch. App. 289.

² Ex parte Chalmers, *supra*; Morgan v. Bain (1874), L. R. 10 C. P. 15; Ex parte Stapleton (1879), 10 Ch. Div. 586; Florence Mining Co. v. Brown (1887), 124 U. S. 385.

³ Florence Mining Co. v. Brown, *supra*.

⁴ Per Brett, J., in Morgan v. Bain, *supra*.

deeming it at an end. Thus it is said: "Where a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.'"¹ "That principle," it is further said,² "has, of course, nothing whatever to do with cases in which there are outstanding interests which the vendor has the power of getting in, because in those cases he is able and he is under an obligation to get them in; but it has a great deal to do with a case in which the only title of the vendor is contingent upon the will and volition of a third person."

6. *That the Other Party has Disabled Himself to Perform.*

§ 1097. **Effect of disabling one's self to perform.**—It is a general principle of law that a party who disables himself from performing his contract before default by the other waives the performance of acts by the latter, which, but for such disability, he would be bound to perform as conditions precedent to a recovery on the contract. Thus, "if A engage B to write articles for a specified term in a periodical publication belonging to A, and before the end of the term A should discontinue the publication; or if he agree to sell B a specified ox, and before the time for delivery should kill and consume the animal; or to load specified goods on board a vessel on a day fixed, and before that day should send them abroad on a different vessel,—it is plain that it would be futile for B, in the cases supposed, to tender articles for insertion in the discontinued publication, or the price of the ox already consumed, or to offer to receive on his vessel goods already sent out of the country; and *lex neminem ad vana cogit*."³

¹ *Forrer v. Nash* (1865), 35 Beav. 167, quoted in *Brewer v. Broadwood* (1882), 22 Ch. Div. 105.

² *Brewer v. Broadwood*, *supra*.

³ *Benjamin on Sale* (6th Am. ed.), § 567, citing *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127; *Bowdell v. Parsons*, 10 East, 359; *Amory v. Brodick*, 5 B. & Ald. 712; *Short v. Stone*, 8 Q. B. 358; *Caines v. Smith*, 15 M. & W. 189; *Reid v. Hoskins*, 4 E. & B. 979, 5 id. 729; *Avery v. Bowden*, 5 E. & B. 714, 6 id. 953; *Bartholomew v. Markwick*, 15 C. B. (N. S.) 710; *Franklin v. Mil-*

7. *Impossibility of Performance.*

§ 1098. **In general.**—The excuse of impossibility of performance may be raised under a variety of circumstances, some of which do, while others do not, present a true case of impossibility. These circumstances may, perhaps, be appropriately classified under three heads: Legal impossibility, Physical impossibility, and Personal inability.

§ 1099. **Legal impossibility excuses.**—If at the time the contract was made it was a lawful contract to make, but, before the time for its performance arrives, the law has made its performance illegal, there is presented what is here meant by a legal impossibility, and it excuses the parties from the performance of their contract.¹

§ 1100. **Physical impossibility excuses.**—So where the parties have contracted in reference to a particular thing, and, before the time for performance arrives, that particular thing has become, without the fault of the promisor, physically impossible to be done, the promisor is excused. Thus, where a present sale is made of goods to be delivered at a future day,

ler, 4 A. & E. 599; *Planché v. Colburn*, 8 Bing. 14; *Robson v. Drummond*, 2 B. & Ad. 303; *Inchbald v. Western Coffee Co.*, 17 C. B. (N. S.) 733.

To same effect: *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232; *Newcomb v. Brackett*, 16 Mass. 161; *Clarke v. Crandall*, 27 Barb. (N. Y.) 73; *Hawley v. Keeler*, 53 N. Y. 114; *Parker v. Pettit*, 43 N. J. L. 512; *Woolner v. Hill*, 93 N. Y. 576; *Lovell v. Insurance Co.*, 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. R. 390; *Chicago v. Tilley*, 103 U. S. 146, 26 L. ed. 371; *Hinckley v. Steel Co.*, 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. R. 375; *Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. R. 127; *Wolf v. Marsh*, 54 Cal. 228.

¹*Brewster v. Kitchel*, 1 Salk. 198; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Cordes v. Miller*, 39 Mich. 581, 33 Am. R. 430; *Semmes v. Insurance Co.*, 13 Wall. (U. S.) 158; *Jamieson v. Indiana Gas Co.*, 128 Ind. 555, 12 L. R. A. 652, 28 N. E. R. 76; *Malcomson v. Wappoo Mills* (1898), 88 Fed. R. 680 (C. C. D. S. Car.); *Mississippi R. R. Co. v. Green*, 9 Heisk. (Tenn.) 538.

In *Fresno Milling Co. v. Fresno Canal, etc. Co.* (1899), 126 Cal. 640, 59 Pac. R. 140, the defendant contracted to supply the plaintiff with water from its canal, if it were not "restrained from delivery." The county supervisors filled in the canal. *Held*, that the defendant was not liable for non-delivery.

and before that day the goods are lost or destroyed without the fault of the seller, the buyer must pay the price and bear the loss, while the seller is excused from his agreement to deliver which has now become physically impossible.¹ And so if the contract be executory, that the seller at some future day will sell and deliver certain ascertained chattels, and before that time they are lost or destroyed without the seller's fault, he is excused from his agreement to sell and deliver,² though of course the loss of the goods falls upon him, as the title had not passed.³ The reason given for this rule is "that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance."⁴

§ 1101. —. The same reason will, of course, apply where, though the particular goods are not specified, the particular place or method or source of supply is made a condition of performance, and performance as stipulated becomes physically impossible.⁵

¹ Per Blackburn, J., in *Taylor v. Caldwell*, 3 Best & Smith, 826, citing *Rugg v. Minet*, 11 East, 210.

In *Nickoll v. Ashton*, [1900] 2 Q. B. 298, there was a contract for a cargo to be shipped per steamship *Orlando*. Before the date of shipment the *Orlando*, without any fault of the sellers, was stranded so that shipment by her became impossible. Held, such a physical impossibility as would excuse the sellers.

² *Taylor v. Caldwell*, *supra*; *McMillan v. Fox* (1895), 90 Wis. 173, 62 N. W. R. 1052; *Siegel, Cooper & Co. v. Eaton Co.* (1897), 165 Ill. 550, 46 N. E. R. 449.

In *Dexter v. Norton* (1871), 47 N. Y. 62, 7 Am. R. 415, it is held in reliance upon *Taylor v. Caldwell*, *supra*, that

where there is a contract to sell and deliver certain ascertained goods at a given date, and before that date arrives the goods are lost by accident and without the vendor's fault, he is not liable in damages to the vendee. See also *Stewart v. Stone* (1891), 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. R. 595.

So where there was a contract for the sale of the crop to be grown on certain land, and the crop failed from blight, it was held that the seller was excused. *Howell v. Coupland*, L. R. 9 Q. B. 462.

³ *Stone v. Waite*, 88 Ala. 599, 7 S. R. 117.

⁴ Per Blackburn, J., in *Taylor v. Caldwell*, *supra*.

⁵ As in *Howell v. Coupland*, *supra*.

§ 1102. —. If the party has partly performed, and full performance then becomes physically impossible without his fault, he may recover for what he has done.¹

§ 1103. **Mere inability of party does not excuse.**— Where, however, the thing is not physically impossible to be done, but the promisor finds himself unable to perform because the source or means or opportunity upon which he relied for performance has failed him, such inability, though arising without his fault, is no excuse unless the parties have so stipulated.² Mere casual

¹ *Angus v. Scully* (1900), 11 Mass. 357, 57 N. E. R. 674; *Butterfield v. Byron* (1891), 153 Mass. 517, 27 N. E. R. 667, 12 L. R. A. 571.

² In *Jones v. United States* (1877), 96 U. S. 24, 24 L. ed. 644, there was a contract to supply the government with uniform cloth by a certain date. Before the cloth was all delivered the mill in which it was being manufactured was destroyed by fire, and the contractor was unable to supply the balance of the goods in time. *Held*, no excuse. In *Booth v. Rolling Mill Co.*, 60 N. Y. 487, *Mechem's Cases on Damages*, 132, there was a contract to supply a quantity of rails by a given date. Before the rails were made the mill burned and rails could not be procured elsewhere, though there was time to have made them before the mill was destroyed. *Held*, no excuse. And *Dexter v. Norton* (47 N. Y. 62), *supra*, was distinguished. In *Summers v. Hibbard* (1894), 153 Ill. 102, 38 N. E. R. 899, the defendants were unable to fill a contract to sell and deliver a quantity of sheet iron because their mill broke down. *Held*, no excuse.

In *Anderson v. May* (1892), 50 Minn. 280, 36 Am. St. R. 642, 17 L. R. A. 555, 52 N. W. R. 530, where there was a

contract for the raising, selling and delivering of beans, but all the raiser's beans, which would otherwise have been sufficient, were destroyed by frost, he was held not excused. He was not restricted as to the place at which they should be raised, and in this respect *Howell v. Coupland*, L. R. 9 Q. B. 462, *supra*, was distinguished. It was, said the court, "a contract in its nature possible of performance."

In *Adams v. Ames* (1898), 19 Wash. 425, 53 Pac. R. 546, a contract was made for the sale of a number of tons of oats, the purchaser to come with a boat to take them away within a certain time, "wind, tide and other acts of God permitting." *Held*, that the purchaser cannot enforce the contract when his failure to come for them was caused by something other than an act of God.

In *Ashmore v. Cox* (1899), 1 Q. B. 436, defendants agreed to sell and deliver two hundred and fifty bales of Manila hemp, to be shipped from the Philippine Islands "by sailer or sailers between May 1 and July 31, 1898. Should the goods, or any portion thereof, not arrive in London from loss of vessel, or other unavoidable cause, this contract to be void for such portion." The Spanish-

impracticability personal to the particular promisor is a very different thing from a general physical impossibility. "Where the contract is to do a thing which is possible in itself," said the supreme court of the United States, "the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by the party, nor was within his control."¹

§ 1104. — Courts, however, will not be astute to so enlarge the construction of a contract that it shall impose a liability which the parties evidently did not contemplate when choosing the language of their agreement. Thus, in a recent case² before the supreme court of the United States it is said: "There can be no question that a party may by an absolute contract bind himself to perform things which subsequently

American war made it, in a business sense, impossible to meet these terms, and the defendants sent the hemp by steamer in September. *Held*, that there was no implied condition relieving the defendants from conformity to the terms on account of this sort of impossibility, and they were liable for breach of contract.

In *Eddy v. Clement* (1866), 38 Vt. 496, there was a contract to furnish lumber for a house by certain times. It was understood, but not agreed, that the seller relied upon the neighboring mills for his supply. Those mills failed to yield a supply because of a drought. *Held*, no excuse.

In *Oakley v. Morton* (1854), 11 N. Y. 25, 62 Am. Dec. 49, the contract was to supply butter during the season from the milk of twenty cows. During the season the milk of part of the cows failed, and this was offered as an excuse for not supplying the butter. *Held*, insufficient.

That the government practically absorbed the carrying capacity of the railway by which the seller ex-

pected to send the goods to fill his contract is no excuse (*Bacon v. Cobb* (1867), 45 Ill. 47); nor that the weather was bad on the day fixed for delivery (*Kitzinger v. Sanborn* (1873), 70 Ill. 146); nor that the weather was so cold that the goods could not be transported without unusual precautions (*Kribs v. Jones* (1875), 44 Md. 396); nor that the canal froze by which he expected to deliver them. *Harmony v. Bingham* (1854), 12 N. Y. 99, 62 Am. Dec. 142. See also *Cunningham Iron Co. v. Warren Mfg. Co.* (1897), 80 Fed. R. 878; *Romero v. Newman* (1898), 50 La. Ann. 80; *Matthews v. American Central Ins. Co.* (1897), 154 N. Y. 449, 48 N. E. R. 751, 61 Am. St. R. 627; *Leavitt v. Dover* (1891), 67 N. H. 94, 32 Atl. R. 156, 68 Am. St. R. 640.

¹ In *Jones v. United States*, *supra*. To same effect: *Walker v. Tucker* (1873), 70 Ill. 527.

² *Chicago, Mil. & St. P. Ry. Co. v. Hoyt* (1893), 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. R. 779.

become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

§ 1105. Unexpected expense does not excuse.—So obviously the fact that the contract cannot be performed without a great and unlooked-for expense does not constitute such impossibility as will excuse.¹

8. *Prevention of Performance.*

§ 1106. Prevention by one party equivalent to performance by the other.—Akin to the question of waiver of performance is that of the prevention by one party of performance by the other. If the performance by one party is a condition precedent to performance by the other, and the latter, when the former offers or is ready to perform, refuses to accept the performance, or hinders or prevents it, this is clearly a waiver and the latter's liability becomes fixed and absolute. This act of prevention may be either an express refusal to accept or permit performance, or it may be some act *in pais* operating more indirectly to prevent or preclude performance.² In either event,

¹ Paine v. Sherwood (1875), 21 Minn. 225 [citing Dermott v. Jones, 2 Wall. 1; Stees v. Leonard, 20 Minn. 494].

² Such a case was Ketchum v. Zeilsdorff, 26 Wis. 514. Here logs, which A had contracted to deliver to B at a certain time, were seized before that time upon a writ of replevin sued out

by C, upon whose bond B became surety. It was held that the delivery of the logs as agreed was prevented by the act of B, and that he could not insist upon delivery until the replevin suit was determined.

Where there was a contract for the sale of a monument with an inscrip-

however, the act or conduct of the one which prevents performance by the other is an excuse for the latter's non-performance. "If it were necessary to cite any case for this, which is evident from common sense," said Ashhurst, J.,¹ "it was so held in Roll's Abridgment and many other books."²

§ 1107. — **After part performance.**—If the prevention is of further performance after the receipt of performance in part, the defaulting party is of course liable for what he has already received and accepted.³

III.

WHAT CONSTITUTES PERFORMANCE.

§ 1108. **In general.**—It remains next to be considered what constitutes performance by each party and what acts are necessary to be performed by each to perfect such performance.

tion of four lines of verse, but the buyer failed to supply the verse, it was held that the seller might recover the price, less the cost of inscribing such a verse. *Eastern Granite Co. v. Heim*, 89 Iowa, 698, 57 N. W. R. 437.

¹In *Hotham v. East India Co.*, 1 T. R. 638, 1 Rev. R. 333.

²*Pontifex v. Wilkinson*, 1 Com. B. 75; *Holme v. Guppy*, 3 M. & W. 387; *Armitage v. Insole*, 14 Q. B. 728; *Ellen v. Topp*, 6 Exch. 424; *Laird v. Pim*, 7 M. & W. 474; *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127; *Russell v. Bandeira*, 13 Com. B. (N. S.) 149; *Mackay v. Dick*, 6 App. Cas. 251; *Costigan v. Mohawk R. R. Co.*, 2 Denio (N. Y.), 609, 43 Am. Dec. 758; *Hosmer v. Wilson*, 7 Mich. 274, 74 Am. Dec. 716; *Howard v. Wilmington R. R. Co.*, 1 Gill (Md.), 311; *Little v. Mercer*, 9 Mo. 216; *Risinger v. Cheney*, 7 Ill. 84; *Allen v. Jarvis*, 20

Conn. 38; *Grove v. Donaldson*, 15 Pa. St. 128; *Kugler v. Wiseman*, 20 Ohio, 361; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528; *Ketchum v. Zeilsdorff*, 26 Wis. 514; *United States v. Peck*, 102 U. S. 64; *Butler v. Butler*, 77 N. Y. 472, 33 Am. R. 648; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. R. 876; *Bucklin v. Davidson*, 155 Pa. St. 362, 26 Atl. R. 643; *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. R. 464; *Ellithorpe Air Brake Co. v. Sire*, 41 Fed. R. 662; *Filley v. Walker*, 28 Neb. 506, 44 N. W. R. 737; *Kelley v. Rowane*, 33 Mo. App. 440; *Day v. Jeffords* (1897), 102 Ga. 714, 29 S. E. R. 591; *Vandegrift v. Cowles, etc. Co.* (1900), 161 N. Y. 435, 55 N. E. R. 941; *Clark v. Johnson Foundry Co.* (Ky., 1897), 42 S. W. R. 844.

³*Hartlove v. Durham* (1898), 86 Md. 689, 39 Atl. R. 617.

This suggests a natural subdivision of the subject as follows:

1. Performance by the seller.
2. Performance by the buyer.

1. Performance by the Seller.

§ 1109. **Of performance by the seller in general.**—The duties which the contract imposes upon the seller are chiefly four, namely:

- I. To convey the title.
- II. To deliver possession.
- III. To comply with all conditions precedent.
- IV. To perform collateral agreements, *e. g.*, warranties.

Each of these several matters must be separately considered and will form the subject of a chapter.

2. Performance by the Buyer.

§ 1110. **Of performance by the buyer in general.**—The duties which the contract imposes upon the buyer are chiefly two, namely:

- I. To accept the transfer and delivery of the goods.
- II. To pay the price.

Each of these matters must likewise be separately considered, and will form the subject of a chapter.

CHAPTER II.

OF THE TRANSFER OF THE TITLE BY THE SELLER.

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| § 1111. Necessity of the transfer. | § 1113, 1114. Evidence of the transfer — Bill of sale. |
| 1112. What constitutes the transfer. | |

§ 1111. **Necessity of the transfer.**— Every sale of goods, when analyzed into its elements, consists, so far as the seller is concerned, of two parts, namely: 1, the agreement to transfer the title; and 2, the actual transfer of the title,—in other words, the contract and the conveyance. It may well happen, as it usually does in actual cases, that these two acts are practically simultaneous, but they are not necessarily so. The first may long precede the second, constituting what has often been called the executory sale. The first may exist though the second never takes place, as where for some reason, like the breaking off of the negotiations or the non-performance of conditions precedent, the occasion for passing the title in pursuance of the agreement never arises. But in order that a sale, as it has been defined in this work, shall exist, it is of course necessary that at *some* time the transfer of the title shall actually take place.

§ 1112. **What constitutes the transfer.**— The question in hand is much simplified by the fact that, in the ordinary case, no formal transfer or conveyance is necessary. Unlike the case of real property, the title to personal property passes, as a general rule, whenever the parties intend that it shall pass. This subject has been already so fully discussed in earlier sections¹ that little further is here required; but, as will be remembered, where the chattel is specifically ascertained the title

¹See *ante*, § 476 *et seq.*

to it passes, as the result of the intention of the parties, whenever and as soon as the bargain is complete and the seller has done everything which the contract contemplates as preliminary to the passing of the title.¹ Where the chattel is not specific at the time of the negotiations, the title, as has been seen, will pass whenever and as soon as some specific chattel has been definitely appropriated to it.² These general rules will of course yield to contrary agreement or to opposing intention; what is here to be emphasized is that, as a rule, whenever it is the intention that the title to a specific chattel shall pass, it does pass by force of that intention.

§ 1113. Evidence of the transfer — Bill of sale.— It is of course entirely competent for the legislature to prescribe some form of making the transfer, or to declare what shall be the evidence of such a transfer, and these statutory requirements must be complied with. The note or memorandum in writing required by the statute of frauds affords the best illustration of the nature and effect of such provisions. Statutes are also found in many States requiring a bill of sale to be executed and perhaps filed or recorded in certain cases, and statutes of this nature must likewise be observed.

§ 1114. — In the absence, however, of these statutory provisions, it is the general rule that sales of chattels require no special formalities and no written conveyance or other documentary evidence of their existence. Written evidence may, in many cases, be a convenience or a matter of precaution, but it is not indispensable except as already indicated.

§ 1115. Duty of the seller.— The duty of the seller to make the transfer of title may be subject to a great variety of conditions precedent, both express and implied, most of which have been already considered. The present question is not with that; but assuming that all conditions precedent to the passing of the title have been performed, what then is the duty

¹See *ante*, § 482.

²See *ante*, § 721.

of the seller? Obviously, to transfer the title, and for this purpose to take all the steps and perform all the acts which are necessary to accomplish that result. If, therefore, selection, appropriation, marking, weighing, measuring or other act is required of the seller, it is his duty to perform that act in the manner and under the circumstances necessary to effectuate the purpose. If written instruments are necessary it is his duty to execute them.

CHAPTER III.

OF THE DELIVERY OF THE GOODS.

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| <p>§ 1116. Of the seller's duty to deliver possession.</p> <p>1117. What is here meant by delivery.</p> <p style="padding-left: 20px;">1. <i>The Obligation to Deliver.</i></p> <p>1118. The obligation to deliver.</p> <p>1119-1121. Delivery usually to be concurrent with payment.</p> <p>1122, 1123. Conditions precedent to delivery — Notice of readiness to deliver or receive.</p> <p style="padding-left: 20px;">2. <i>The Place of Delivery.</i></p> <p>1124. When no place specified, delivery to be where goods were at time of sale.</p> <p>1125. Where time is fixed but not the place.</p> <p>1126. Where the place is fixed but not the time.</p> <p>1127. Where place at option of one party.</p> <p>1128. Agreement as to place must be complied with.</p> <p style="padding-left: 20px;">3. <i>The Time of Delivery.</i></p> <p>1129. Time of delivery when no time agreed upon — Reasonable time.</p> <p>1130. — When notice is required.</p> <p>1131. — Agreement to deliver during indefinite period.</p> <p>1132, 1133. — Reasonable time, how determined.</p> <p>1134. Delivery where time is agreed upon — Construction of terms.</p> <p>1135. — Month — Day.</p> | <p>§ 1136. — Computation of time.</p> <p>1137. — Hour of day.</p> <p>1138. — Time of the essence of contract.</p> <p>1139. — Performance at time a condition precedent.</p> <p>1140. Delivery by instalments — Breach of one of successive performances.</p> <p>1141-1143. — The English rule.</p> <p>1144. — The rule in the United States.</p> <p>1145. — <i>Norrington v. Wright</i> — Default in delivery.</p> <p>1146. — <i>Pope v. Porter</i> — Default in delivery.</p> <p>1147. — <i>McGrath v. Gegner</i> — Default in payment.</p> <p>1148-1150. — Weight of authority.</p> <p>1151, 1152. Alterations by consent in time or place of delivery.</p> <p>1153. <i>Résumé</i> of cases.</p> <p style="padding-left: 20px;">4. <i>The Thing to be Delivered.</i></p> <p>1154-1156. Article delivered must be the article agreed upon.</p> <p>1157. Amount delivered must be the amount agreed upon.</p> <p>1158. — Tender of too much — Rejection — Selection.</p> <p>1159. — Excess not charged for.</p> <p>1160. — Waiver of discrepancy.</p> <p>1161. — Tender of too little — Rejection — Acquiescence.</p> <p>1162. — Retention of part delivered — Implied promise to pay therefor.</p> |
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§ 1163, 1164. — Severable contract. Recovery for part performance.

1165. — Severable contract — Failure as to part.

1166-1169. — Quantity indefinite — "More or less" — "About."

1170, 1171. — Quantity indefinite — Option as to quantity — Election.

5. *To Whom Delivery is to be Made.*

1172. Must be to buyer or some one who represents him for that purpose.

1173. Delivery to agent sufficient.

1174. Delivery to one of joint purchasers sufficient.

1175. Delivery to carrier, when sufficient.

1176. — How question arises.

1177. — How question determined.

1178-1180. — Is matter of agreement — Construction of agreement.

1181. Undertaking of seller to "send," "ship" or "forward" goods, how satisfied.

1182. — Selection of carrier.

1183. — Delivery to the carrier must be made with due care.

1184. Undertaking of seller to deliver the goods, how satisfied.

6. *What Constitutes Delivery.*

§ 1185. In general.

1186. Delivery complete when goods properly placed at buyer's disposal.

1187, 1188. What acts necessary in ordinary cases.

1189. — Seller in readiness though buyer in default.

1190. — Marking and setting aside.

1191. — Where goods are on seller's land — License.

1192. — Where goods in custody of a third person.

1193. — Where goods in possession of bailee — Attornment.

1194. — Delivery by transfer of bill of lading or warehouse receipt.

1195. — Delivery to carriers.

1196. — Delivery by carriers.

1197. — Delivery where goods are bulky or not capable of manual delivery — Symbolical delivery.

1198. — Delivery where goods are retained by seller as bailee of buyer.

1199. — Delivery of growing crops.

1200. — Delivery of articles situate on land sold.

1201. — Delivery of goods on vessel at sea.

1202. — Delivery where goods already in possession of buyer.

§ 1116. Of the seller's duty to deliver possession.— The next duty to be considered is that of the seller to deliver possession of the goods. When the title has passed that fact ordinarily draws with it the right to the possession, and, unless there is some agreement to the contrary, it is the duty of the seller, as part of the contract of sale, to put the buyer in pos-

session. The right to possession may, however, remain in the seller as the result of express or implied conditions to that effect, notwithstanding that the title has passed. What these conditions are is elsewhere considered, and the subject for investigation here is the general duty when no such conditions intervene. So also the buyer, by agreement, may be entitled to possession before the title has passed, but that form of agreement has likewise been elsewhere considered. That which it is now the purpose to discuss is delivery in performance and execution of the contract to sell.

§ 1117. **What is here meant by delivery.**—The term “delivery” as used in the law of sale has unfortunately no single and precise meaning, but is employed in a great variety of significations. It is used to express that slight act of designation requisite to effect a change of title between the parties.¹ It is used to express the receipt and acceptance requisite to satisfy the statute of frauds.² It is used to express the change of possession necessary to sustain the sale as against the claims of creditors.³ It is used to designate that parting with possession which will destroy the seller’s lien.⁴ It is used to express that act of surrender by a carrier which will put an end to the seller’s right of stoppage *in transitu*.⁵ None of these uses, however, is the one here intended. That which is here involved is that surrender of possession which would enable the seller to sustain an action as for goods sold and delivered or to successfully resist an action by the buyer for non-delivery.

It involves such questions as:

1. The obligation to deliver.
2. The place of delivery.
3. The time of delivery.
4. The thing to be delivered.
5. The person to whom delivery is to be made.
6. What constitutes delivery.

¹See *ante*, § 695 *et seq.*

²See *ante*, § 355.

³See *ante*, § 962.

⁴See *post*, § 1482; *Arnold v. Delano*,

4 Cush. (Mass.) 33, 50 Am. Dec. 754.

⁵See *post*, § 1597.

1. *The Obligation to Deliver.*

§ 1118. **The obligation to deliver.**—It is an implied term in the contract of sale that the seller will not only transfer the title but will deliver the goods to the buyer whenever everything has been done which entitles the latter to possession, and an action may be maintained by the buyer if the seller refuses to deliver.¹ The obligation to deliver may also be imposed by the express terms of the contract, and, as between themselves, the parties may make such terms as please them respecting the time, place or other circumstances of the delivery.² Where, however, they have made no such contract, the law supplies the rule which shall govern these various incidents, and what this rule shall be it is one of the purposes of this chapter to determine.

§ 1119. **Delivery usually to be concurrent with payment.** The first and most important of the general principles applicable to this subject is, that where no term of credit is given or other special arrangement made the delivery by the seller is to be concurrent with payment for the goods by the buyer. Even though the sale be so far completed that the title has passed, the buyer, in the absence of any agreement to the contrary, is not entitled to possession until he pays or tenders the price.³ “Where goods are sold,” said Bayley, J., in a leading case,⁴ “and nothing is said as to the time of the delivery or the time of payment, and everything the seller has to do with them

¹ “In every contract of sale there is on the part of the vendor an obligation, not only to transfer the property in the thing sold, but also to deliver possession to the buyer.” Per Cockburn, C. J., in *Calcutta Co. v. De Mattos*, 32 L. J. R. Q. B. 322, 335. “The obligation to deliver, if not expressed, is implied.” *Gray v. Walton*, 107 N. Y. 254, 14 N. E. R. 191; *Buddle v. Green* (1857), 3 H. & N. 906.

² See *Stephens v. Gifford*, 137 Pa. St.

219, 21 Am. St. R. 868, 20 Atl. R. 542. See also, per Blackburn, J., in *Calcutta Co. v. De Mattos*, *supra*.

³ See discussion of payment as a condition precedent, *ante*, §§ 538–557.

⁴ *Bloxam v. Sanders* (1825), 4 Barn. & C. 941, 10 Eng. Com. L. 868. See also *Dixon v. Yates* (1833), 5 B. & Ad. 313, 27 Eng. C. L. 86; *Simmons v. Swift* (1826), 5 B. & C. 857, 11 Eng. C. L. 712; *Mowry v. Kirk* (1869), 19 Ohio St. 375.

is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, *upon payment of the price*; but the buyer has no right to have possession of the goods *till he pays the price*."

§ 1120. —. "The seller's right in respect of the price," continued the learned judge, "is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute: it is liable to be defeated if he becomes insolvent before he obtains possession."

§ 1121. —. The parties may, of course, agree upon a term of credit, or make other arrangements postponing payment, and in such cases the buyer is entitled to delivery without it; but, as stated above, unless such agreement is made, the seller must be ready and willing to deliver the goods in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the goods.¹

¹ Chapman v. Lathrop, 6 Cow. (N. Y.) Mo. 558, 38 Am. St. R. 615, 22 S. W. R. 110, 16 Am. Dec. 433; Cole v. Swanson, 1 Cal. 51, 52 Am. Dec. 288; Southwestern Freight Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Walter v. Reed, 34 Neb. 544, 52 N. W. R. 682; Haskins v. Warren, 115 Mass. 514; Stoolfire v. Royse, 71 Ill. 223; Simmons v. Green, 35 Ohio St. 104; Phelps v. Hubbard, 51 Vt. 489; Diem v. Koblitz, 49 Ohio St. 41, 34 Am. St. R. 531, 29 N. E. R. 1124; Johnson-Brinkman Co. v. Central Bank, 116

Mo. 558, 38 Am. St. R. 615, 22 S. W. R. 813.

In Hapgood v. Shaw (1870), 105 Mass. 276, Hapgood ordered some guns from a manufacturer in England, through Shaw and Warren, who were doing business as shipping merchants in Boston and Liverpool under the name of Warren & Co. The manufacturer sent the guns ordered, and also others not ordered, to Warren & Co., who paid for them and sent them to America without

§ 1122. Conditions precedent to delivery.—In the absence of a contrary agreement, either express or implied from the nature of the goods, the previous dealings of the parties or the other circumstances of the case, the seller is not bound to send or carry the goods to the buyer. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, or, as it is sometimes said, by being ready and willing to surrender them to the buyer, so that the latter may remove them without lawful obstruction.¹ This must certainly be the case where delivery is to be upon demand; but the rule, as will be seen,² is otherwise, where the seller, under the contract, is bound to take the initiative.

§ 1123. — Notice of readiness to deliver or receive.—By the express or implied conditions of the agreement, also, it may be that something is to be done or some notice is to be

authority. An agreement was then made between Warren & Co. and Hapgood whereby the former bound themselves to deliver the guns to Hapgood on or before the 1st of June next, as Hapgood should elect, upon payment of the price due, with freight charges and interest on remittance; and Hapgood agreed to receive the guns on or before that date. It was shown on the trial that up to June 1st Warren & Co. never delivered or offered to deliver the guns, nor made any statement of the amount due, and that Hapgood never asked for such statement or paid or offered to pay the amount. The court said: "Upon that statement neither party is in default; neither can hold the other for a breach of the agreement. Hapgood was bound to pay only upon delivery of the guns, and Warren & Co. were bound to deliver the guns only upon payment. Upon such an agreement, if both parties remain inactive, there is no breach by either. If either would charge

the other upon it, he must put him in default; he must show a refusal of the other party to perform, or some act or neglect on his part which may be regarded as equivalent to a refusal. Unless excused from performance on his own part by the refusal of the other party to perform, or some conduct equivalent to a refusal, he must show that he has offered to perform his part of the agreement; or at least that he gave notice of his readiness to perform, or, being thus ready, requested performance by the other party. Failing to do that, he cannot charge the mere neglect of the other party to take any action as a refusal to perform or as a breach of the agreement."

¹ Benjamin on Sales (6th Am. ed.), § 679. See also *Hillestad v. Hostetter*, 46 Minn. 393, 49 N. W. R. 192; *Goddard v. Binney*, 115 Mass. 450, 15 Am. R. 112.

² See *post*, § 1125.

given by one party before delivery is due. If, for example, the seller is to manufacture or otherwise prepare the goods for delivery to the buyer, who is then to come and get them, the seller must give the buyer notice when they are ready.¹ If, on the other hand, the goods are to be delivered when the buyer is in readiness to receive them, the buyer must give the seller notice when he is so ready.² Until such notice is given in a reasonable and timely manner, the other party cannot be in default; if the notice is given and the other then fails or refuses to deliver or receive, the party giving the notice may treat the contract as broken by the other.³

2. *The Place of Delivery.*

§ 1124. **When no place specified, delivery to be where goods were at time of sale.**—In respect of the place of delivery where no place is agreed upon by the parties, it is the general rule that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, or other place at which the commodities sold are known to be deposited or kept, must be the place where the demand and delivery are to be made when the contract is silent as to the place.⁴ And the same rule

¹ See *post*, § 1130; *Bliss Co. v. U. S. Incandescent Gas L. Co.* (1896), 149 N. Y. 300, 43 N. E. R. 859.

² See *post*, § 1130.

³ See *post*, §§ 1128–1130.

⁴ *Janney v. Sleeper*, 30 Minn. 473, 16 N. W. R. 365 [citing *Middlesex Co. v. Osgood*, 4 Gray (Mass.), 447; *Smith v. Gillett*, 50 Ill. 290; *Hamilton v. Calhoun*, 2 Watts (Pa.), 139; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Rice v. Churchill*, 2 Denio (N. Y.), 145; *Wilmouth v. Patton*, 2 Bibb (Ky.), 280; *Sousely v. Burns*, 10 Bush (Ky.), 87; *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. ed. 554; *Perlman v. Sartorius*, 162

Pa. St. 320, 42 Am. St. R. 834, 29 Atl. R. 852; *Gray v. Walton*, 107 N. Y. 254, 14 N. E. R. 191; *Dakota Stock Co. v. Price*, 22 Neb. 96, 34 N. W. R. 97; *Ragland v. Wood* (1881), 71 Ala. 145; *Phoenix Lock Works v. Hardware Co.* (1891), 9 Houst. (Del.) 232, 32 Atl. R. 79.

Seller's residence.—Where cumbersome goods are to be delivered and no place is agreed upon, the seller's residence is said to be the place which the law implies. *Sousely v. Burns*, *supra* (hogs); *Wilmouth v. Patton*, *supra* (a negro). See *Sale of Goods Act*, *post*, Appendix, 29 (1).

would apply where the goods are to be manufactured, grown or produced.¹ This rule may, of course, be altered by the circumstances of the case, the nature of the property, the situation of the parties, their previous course of dealing or the custom of the trade; but in the absence of some such facts to show a contrary intention, the rule given will prevail.²

Place where goods are at time.— In *Smith v. Gillett*, *supra*, the court say: "What could be a more natural and reasonable inference, if A, owning a large lot of cattle then being fed in a certain lot of his or of another person, agreeing to sell them to B at a certain price per hundred weight, and to deliver them on one of two days named, and nothing is said about the place of delivery than that the place where they are being fed should be the place of delivery? What, under such a contract, would be the duty of B? To be at the lot on the day named, ready and willing to pay the price agreed on, when the weight is ascertained. And would it not be an inference equally natural and reasonable that the most convenient cattle scales would be resorted to for this purpose?" In *Dakota Stock Co. v. Price*, *supra*, where the contract was for the sale of a herd of cattle running on a large ranch and range, it was said that "the place of delivery was, in the nature of things, at the ranch, the temporary residence of the foreman and men in charge of the property, and *prima facie* the place where the property was."

Section 3057 of the code of Iowa provides that where a contract for the payment or delivery of property other than money does not fix a place of payment, the maker may tender the property at the place

where the payee resided at the time of making the contract, or, etc. In *Holz v. Peterson* (1895), 98 Iowa, 741, 62 N. W. R. 19, the court construed this section and held that in a contract for the sale and delivery of cattle, in the absence of a stipulated place for delivery, the place of delivery is that of the buyer.

¹ In *Bliss Co. v. U. S. Incan. Gas L. Co.* (1896), 149 N. Y. 300, 43 N. E. R. 859, it is held that on a contract to manufacture goods, *e. g.*, dies to cut gas burners, where no place of delivery is specified, the goods would be delivered at the seller's factory; and it would be his duty, on completion of the goods, to notify the buyer and give him an opportunity to inspect the goods at the factory to determine whether they corresponded with the terms of the contract. If they do, it is the buyer's duty to take and pay for them.

² "Where no place of delivery is provided it may be inferred from the circumstances of the case, from the usages of trade, or the previous course of dealing between the parties, or even from the nature of the article sold." *Van Valkenburgh v. Gregg*, 45 Neb. 654, 63 N. W. R. 949; *Hatch v. Oil Co.*, 100 U. S. 124; *Field v. Runk* (1850), 22 N. J. L. 525; *Bronson v. Gleason* (1849), 7 Barb. (N. Y.) 472.

Where there had been a previous contract for the sale of goods to be

§ 1125. **Where time is fixed but not the place.**—There may be cases, however, in which the seller is bound to take the initiative. It is said that such is the case “where, though the place is not fixed, the time on or before which the vendor binds himself to deliver the articles is stipulated; for there the party to deliver must become the first actor, in order to fulfill his contract.”¹ In these cases, it is said, in analogy to notes payable in specific articles, the seller must seek out the buyer and tender him the articles if they are portable, and if they are cumbersome must ask the buyer to appoint a place of delivery.²

The analogy referred to, however, is believed to be a doubtful one, and there can be no question that, by the weight of authority, the rule referred to in the preceding section applies as well to portable as to ponderous goods.³

delivered at a particular place, and soon after the seller offered to sell more without mentioning the place, it was held that in the absence of proof to the contrary it would be presumed that the place of delivery was to be the same as before. *Bacon v. Cobb*, 45 Ill. 47.

¹ *Barr v. Myers* (1842), 3 Watts & Serg. (Pa.) 295.

² *Barr v. Myers*, *supra*; *Roberts v. Beatty* (1830), 2 Pen. & Watts (Pa.), 63; *Allen v. Woods* (1854), 24 Pa. St. 76; *Goodwin v. Holbrook* (1830), 4 Wend. (N. Y.) 377. See also *Miles v. Roberts*, 34 N. H. 245; *Morey v. Enke*, 5 Minn. 392; *Lincoln v. Gallagher* (1887), 79 Me. 489, 8 Atl. R. 883.

³ See *Story on Sales* (4th ed.), §§ 307, 308. Compare *Corbin's Benjamin*, p. 890, with *Bennett's Benjamin* (6th ed.), p. 559.

In *Ragland v. Wood*, 71 Ala. 145, it is said: “The rule governing the place of delivery in cases of this kind is not entirely free from doubt,

the authorities being in irreconcilable conflict. Where money is to be paid, it seems well settled that the payor must seek the payee, and make a tender of the amount due him, in the absence of a contrary stipulation. In the case, however, of specific articles, if no place of delivery is specified, the general rule is, especially when such chattels are cumbersome, that they are to be delivered at the place where they are or are to be manufactured. The vendor, unless otherwise agreed, is not bound to send or carry the goods to the vendee. All that he is required to do is to deliver *on demand* to the purchaser. Such an obligation does not become payable in money, and the foundation of a suit, until there has been a demand by the purchaser and a refusal on the part of the vendor to deliver. The case of *Cobb v. Reed*, 2 Stew. 444, holding the contrary, is unsupported by principle or authority, and is overruled. This seems to us the

§ 1126. Where the place is fixed but not the time.—Where the place is fixed but not the time, neither party, as will be seen,¹ can ordinarily put the other in default until, in some way, the other has had reasonable notice of the time when delivery would be offered or demanded.

§ 1127. Where place at option of one party.—Where expressly or by implication the place of delivery is at the option of either party, that fact throws upon him the burden of taking the initiative, and it is his duty to give notice of the place at which the goods will be offered or demanded.² If the contract fixes the kind or time of the notice, the contract must prevail; if it does not, reasonable notice would be required.³ Until such notice is given, the other party, if ready and willing to perform, is not in default.⁴

§ 1128. Agreement as to place must be complied with.—If the parties by their agreement have fixed the place of delivery, delivery at the place so specified is, unless it be waived,

sounder and more sensible rule and better in harmony with the modern usages of commerce and the customs of every-day business. Benjamin on Sales, § 679; 5 Wait's Act. & Def. 570; 2 Kent's Com. 505; Lobdell v. Hopkins, 5 Cow. (N. Y.) 516; Minor v. Michie, Walker's (Miss.) R. 24; Bishop on Contr. 699, and cases cited; Greenwood v. Curtis, 6 Mass. 358; Stevens v. Adams, 45 Me. 611; Johnson v. Baird, 3 Blackf. (Ind.) 153."

¹ See *post*, § 1130.

² Dwight v. Eckert, 117 Pa. St. 490, 12 Atl. R. 32; Brooklyn Oil Refinery v. Brown, 38 How. Pr. (N. Y.) 444; Posey v. Scales, 55 Ind. 282; Armistage v. Insole (1850), 14 Q. B. 728; Walton v. Black (1876), 5 Houst. 149; Rogers v. Van Hoesen (1815), 12 Johns. 221; Hunter v. Wetsell (1881), 84 N. Y. 549.

³ "Where a contract names several places, at any one of which personal property may be delivered, at the buyer's option, the buyer must within a reasonable time make his selection of the place." Boyd v. Gunnison, 14 W. Va. 1.

⁴ Lockhart v. Bonsall, 77 Pa. St. 53; Hunter v. Wetsell, 84 N. Y. 549. "Where the vendee, is by the terms of the contract, to designate a place of delivery, the vendor is bound to be ready to make delivery at the place designated. If the vendee omits to designate the place, the vendor is guilty of no breach of contract if the articles are ready for delivery at the time fixed by the contract." Lucas v. Nichols, 5 Gray (Mass.), 309.

an indispensable requisite to the seller's recovery;¹ and, on the other hand, delivery or a readiness to deliver at that place is a sufficient performance on his part to entitle him to recover, even though the buyer was not there to receive the goods.²

3. *The Time of Delivery.*

§ 1129. **Time of delivery when no time agreed upon — Reasonable time.**— The time for the delivery of the goods may be fixed by the agreement of the parties, but if they do not fix it the law itself will determine it. If the contract of sale has reference to a specific article in the immediate possession of the seller and capable of a present delivery, the law, in the absence of a stipulation to the contrary, would imply an agreement to complete the contract at once by an immediate concurrent delivery and payment; though if neither party offered or demanded performance there must still be deemed to be a sale, of which either party may require performance, if he does so within a reasonable time.³ If, however, the goods are known not to be in the immediate possession of the seller, or not to be ready for delivery, or not to be in such a position or situation that an immediate delivery is feasible,⁴ then, if the parties make no

¹ Van Valkenburgh v. Gregg (1895), 45 Neb. 654, 63 N. W. R. 949; Miller v. Somerset Co. (Ky., 1899), 51 S. W. R. 615; Savage Mfg. Co. v. Armstrong, 19 Me. 147.

² See *post*, § 1189; Phelps v. Hubbard (1879), 51 Vt. 489; Barton v. McKelway, 22 N. J. L. 165; Wisecarver v. Adamson, 118 Pa. St. 53, 12 Atl. R. 358; Sedgwick v. Cottingham (1880), 54 Iowa, 512; Washburn Iron Co. v. Russell (1880), 130 Mass. 543.

³ See *ante*, § 484. As has been seen in the section here referred to, where the parties bargain in respect of a specific chattel, "the effect of the contract," to use the language of Mr. Justice Parke, "is to vest the prop-

erty in the bargainee." Dixon v. Yates (1833), 5 Barn. & Ad. 313, 27 Eng. Com. L. 86; Bloxam v. Sanders (1825), 4 Barn. & Cr. 941, 10 Eng. C. L. 868; Simmons v. Swift (1826), 5 Barn. & Cr. 857, 11 Eng. Com. L. 712; Mowry v. Kirk (1869), 19 Ohio St. 375.

⁴ Thus where there was an order for a soda fountain to be sent by freight "as soon as possible," but it appeared from the order that it was "to be finished" according to certain specifications, it was held that a reasonable time in which to so finish it must be allowed. Tufts v. McClure, 40 Iowa, 317. And so where cattle roaming on a range were to be "rounded up" and branded. Wal-

other agreement, the law must imply an undertaking by the seller to deliver within a reasonable time.¹ But if these facts, though known by the seller, are not known by the buyer and are not disclosed to him, a presumption of immediate delivery otherwise arising would not be dispelled.²

Under the rule thus laid down, if the seller is to send or carry the goods to the buyer, and no time is limited, he must do so within a reasonable time;³ if the buyer is to come or send

den v. Murdock (1863), 23 Cal. 440, 83 Am. Dec. 135. Where a contract is made for delivery of saw logs the next spring, but, if not practicable then, the spring following, a delivery the second spring satisfies the contract if it is shown that delivery was not practicable the first spring; and no damages are recoverable for delay or depreciation in value during the year. Irish v. Pauley (1897), 116 Cal. xvi, 48 Pac. R. 321.

¹ Sale of Goods Act (*post*, Appendix), 29 (2); Ellis v. Thompson (1838), 3 Mees. & Wels. 445; Greenbrier Lumber Co. v. Ward (1892), 36 W. Va. 573, 15 S. E. R. 89; Boyd v. Gunnison (1878), 14 W. Va. 1; Bolton v. Riddle (1876), 35 Mich. 13; Stange v. Wilson (1868), 17 Mich. 342; American Oak Extract Co. v. Ryan (1894), 104 Ala. 267, 15 S. R. 807; Dennis v. Stoughton (1883), 55 Vt. 371; Pope v. Terre Haute Car & Mfg. Co. (1887), 107 N. Y. 61; and other cases cited in following notes.

In Umfrid v. Brookes (1896), 14 Wash. 675, 45 Pac. R. 310, plaintiff contracted to sell defendant certain shares of stock, at a stated price, on or before three years from date, the shares to be placed in escrow subject to defendant's order upon payment of the amount due thereon, defendant to pay interest from the date of

the contract. The stock was not deposited for sixteen months. *Held*, that, there being no time stated, a reasonable time was presumed for the deposit, and that sixteen months was not a reasonable time within which to deposit; wherefore defendant is relieved from liability for specific performance.

In Fisher v. Boynton (1895), 87 Me. 395, 82 Atl. R. 995, defendant gave an order for cigars. Having waited nineteen days without hearing anything from his order, he countermanded it and bought elsewhere. *Held*, that the delay was unreasonable, and no action for the price was maintainable.

² Thus, where the contract was to deliver "immediately," the fact that, unknown to the buyer, the seller did not have the goods and would need eight days to collect them, is no excuse for the delayed delivery. Woods v. Miller, 55 Iowa, 168, 39 Am. R. 170, 7 N. W. R. 484.

³ Where the order for goods to be sent stipulates that they are to be sent as "soon as possible," the seller has a reasonable time to prepare and ship them. Tufts v. McClure, 40 Iowa, 317. To do a thing "as soon as possible" means to do it within a reasonable time, with an undertaking to do it in the shortest practicable

to get the goods, and no time is specified, he must do so within a reasonable time.¹

§ 1130. — When notice required.— If, though no time or place is specified, it is the fair interpretation of the contract that the goods are to be delivered when the seller has gotten them in readiness for delivery — as where the goods are known to require making, finishing, importing, and the like,— the buyer is entitled to reasonable notice when and where they will be ready for delivery, in order that he may be ready to receive them, before he can be deemed in default;² if the place is specified but not the time, neither party can ordinarily put the other in default by tendering or demanding delivery at that place, unless reasonable notice of such act has been given to the other,³ or unless the place or circumstances are such as to fairly make the act appropriate without previous notice;⁴

time. *Hydraulic Eng. Co. v. McHaffie*, 4 Q. B. Div. 670, distinguishing if not reconciling *Attwood v. Emery*, 1 Com. B. (N. S.) 110; *American Extract Co. v. Ryan* (1894), 104 Ala. 267, 15 S. R. 807; *Henkle v. Smith* (1859), 21 Ill. 238; *Dennis v. Stoughton* (1883), 55 Vt. 371; *Kribs v. Jones*, 41 Md. 396; *Cocker v. Manufacturing Co.* (1839), 3 Sumn. 530.

¹ *Cameron v. Wells* (1858), 30 Vt. 633; *Blydenburgh v. Welsh* (1831), Bald. 331, 3 Fed. Cas. 771; *Bolton v. Riddle* (1876), 35 Mich. 13; *Mowry v. Kirk* (1869), 19 Ohio St. 375. See also *Simmons v. Green* (1878), 35 Ohio St. 104; *Zuck v. McClure* (1881), 98 Pa. St. 541.

² *Hunter v. Wetsell*, 84 N. Y. 549; *Lockhart v. Bonsall*, 77 Pa. St. 53; *Bliss v. U. S. Incandes. Gas L. Co.* (1896), 149 N. Y. 300, 43 N. E. R. 859.

³ In an action for breach of contract to deliver barrels upon a boat in a certain creek, when they were

to be paid for, it was held to be the duty of the seller, when prepared to deliver them, to notify the buyer of his readiness; and if, without such notice, he took them away and sold them elsewhere, he would be liable for a breach of his contract. *Cullom v. Wagstaff* (1864), 48 Pa. St. 300. Where, under the contract, the buyer is to have thirty days' time in which to remove the goods after notice that they are in readiness for delivery, he cannot be in default before the expiration of that time. *Empire State Phosphate Co. v. Heller* (1894), 61 Fed. R. 280, 20 U. S. App. 589, 9 C. C. A. 504; *Henkle v. Smith* (1859), 21 Ill. 238.

⁴ It is obvious that the circumstances of each case must largely affect this question. If goods are to be delivered at the buyer's place of business and are such as he could reasonably be expected to receive and pay for on any day during busi-

if the time or place of delivery is expressly or impliedly at the option of either party, he cannot tender or demand delivery until he has given reasonable notice of the time or place at which such delivery is to be made.¹

ness hours, previous notice could scarcely be required; neither could it be if they were to be delivered at the seller's place of business when demanded, and were such as he ordinarily carried in stock and could deliver on a moment's notice. If in either case, however, the goods were unusual in quantity or kind, or such as the party could not reasonably be expected to deliver or to receive and pay for without notice, notice must be given.

¹ *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. R. 32; *Rogers v. Van Hoesen*, 13 Johns. (N. Y.) 221; *Dingley v. Oler*, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850.

Thus in *Harrow Spring Co. v. Whipple Harrow Co.* (1892), 90 Mich. 147, 30 Am. St. R. 421, 51 N. W. R. 197, it was held to be the fair construction of a contract to supply castings from patterns agreed upon, that the seller should have a reasonable time, after being informed of the number wanted, in which to manufacture and ship them.

And clearly if the goods are to be supplied "at the option of" the buyer "at any time" during a specified period, the seller is not in default until the buyer has notified him of the time and place when the goods will be required; until such notice, it is enough that the seller is in readiness to deliver the goods when demanded. *Posey v. Scales* (1876), 55 Ind. 282.

Where plaintiff sold to defendant some cars of lead, which were to be shipped to East St. Louis or Chicago at

defendant's option, and plaintiff sent for shipping instructions, but defendant did not send them, it was held that this was a rejection of the goods, and plaintiff could at once bring action. *Weill v. American Metal Co.* (1899), 182 Ill. 128, 54 N. E. R. 1050.

In *Lockhart v. Bonsall*, 77 Pa. St. 53, where oil was to be delivered at such place as the buyer should designate, it was said: "It was his duty to give reasonable and timely notice of the place of delivery and to be there ready to receive and pay for it at the stipulated price per gallon." In *Hunter v. Wetsell*, 84 N. Y. 549, where hops were to be delivered at a place designated by the buyer and examined by him, but he made no such designation, after being notified that the hops were ready for delivery, it was held that the seller might recover the price. Where cattle sold are to be delivered "at the option" of the buyer "at any time" between certain dates, the seller, being ready and willing to deliver, is not in default until the buyer has notified him of the time and place of delivery. *Colvin v. Weedman* (1869), 50 Ill. 311. Where plaintiff sued for non-delivery of lumber for which he was to furnish cars, but had not, the court said: "The plaintiff, seeking to recover damages for the non-delivery, must show that he had done all that was required of him by the contract. The plaintiff neither paid nor offered to pay, nor did he provide cars nor offer to provide cars, nor express his willingness and readiness to do so, nor

Where the goods are to be delivered when the buyer gives notice of his readiness to receive them, or gives shipping directions, the buyer is bound to act within a reasonable time and his failure to do so will exonerate the seller from the necessity of doing that, *e. g.*, shipping the goods, which was to be done when the buyer had so acted.¹

did he ever notify the defendant that cars were at the station ready to receive the lumber, nor was there any demand by the plaintiff on the defendant to deliver the lumber. Under these circumstances the plaintiff is not entitled to damages." *Kunkle v. Mitchell*, 56 Pa. St. 100. To same effect: *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. R. 836. See also *Robison v. Tyson*, 46 Pa. St. 286.

F. O. B.—Where the goods are to be delivered "free on board" the buyer's vessel, the seller is under no obligation to act until the buyer names or supplies the vessel. *Armitage v. Insole*, 14 Q. B. 728; *Wackerbarth v. Masson*, 3 Camp. 270; *Sutherland v. Allhusen*, 14 L. T. (N. S.) 666; *Walton v. Black*, 5 Del. 149; *Dwight v. Eckert*, 117 Pa. St. 490, 12 Atl. R. 32.

So, where the buyer had the option of demanding the chattels (hogs) between the 10th and 20th of November, the court said, respecting the rights and obligations of each, that if the buyer intended to comply with his contract, "it was his duty to have given his vendor reasonable notice on which of the days he would receive them. His failure to do that fixed the last day as the one on which the hogs should be delivered, and gave to the vendor the unconditional right to require of his vendee to perform his contract on that day. If then he was not bound to be ready to deliver the hogs on each and every

day between the days prescribed, he was bound to be ready at his own residence on the last-named day; and to enable him to maintain an action on the contract he should have averred a readiness and willingness to deliver the one hundred head of hogs of the description designated in the contract at his residence on the 20th of November, 1870, and that appellant failed to attend to receive them (*Chandler v. Robertson*, 9 Dana, 291)." *Sousely v. Burns* (1873), 10 Bush (Ky.), 87.

In *Graham v. Van Diemen's Land Co.* (1855), 11 Exch. 101, 30 Eng. L. & Eq. 574, Maule, J., said "that reasonable time will not begin to run until some one interested in the matter calls for something to be done respecting it." Approved in *Cameron v. Wells* (1858), 30 Vt. 633.

¹ *Louisville, etc. Ry. Co. v. Diamond State Iron Co.* (1888), 126 Ill. 294, 18 N. E. R. 735; *Sanborn v. Benedict* (1875), 78 Ill. 309. In *Kingman & Co. v. Hanna Wagon Co.* (1898), 176 Ill. 545, 52 N. E. R. 328, the defendant agreed to purchase fifteen hundred wagons from plaintiff, to be delivered "as ordered" in monthly instalments. Defendant did not order as many as the contract called for. *Held*, that the plaintiff was not under obligation to make a tender of the wagons in order to maintain an action for non-acceptance.

§ 1131. — **Agreement to deliver during indefinite period.**— Where the contract is to supply goods during a period not fixed, the court will not construe it as of unending duration, but, if not terminable at will, it will at least not continue for more than a reasonable time.¹

§ 1132. — **Reasonable time, how determined.**— What is a reasonable time in these cases is usually a question of fact to be determined by the jury in view of all the circumstances of the case;² but where the facts are not in dispute, or the mat-

¹ Echols v. New Orleans, etc. R. Co. (1876), 52 Miss. 610 [citing Cocker v. Franklin Mfg. Co., 3 Sumn. 530; Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Palmer v. Vanderberg, 3 Wend. (N. Y.) 193; McLees v. Hale, 10 Wend. 426; Knowlton v. Newell, 10 Allen (Mass.), 34; Butler v. Smith, 35 Miss. 457; Kirkland v. Carr, 35 Miss. 584]. See also Warren v. Wheeler, 8 Metc. (Mass.) 97; Hill v. Hill, 113 Mass. 103, 18 Am. R. 455; Williams v. Hart, 116 Mass. 513.

Where the goods were to be delivered as the buyer required, it was held that, while a reasonable time was implied, yet, if the buyer did not ask for any goods within a reasonable time, the seller must ask if he meant to do so before the seller could deem the contract at an end. Said Alderson, B.: "So soon as a reasonable time elapsed it was competent for the defendant [the seller] to say, 'I desire you to ask me to deliver the iron now or never.'" Pollock, C. B., said: "The defendant reads the contract as if the condition which the law implies were part of it. No doubt, where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another

maxim of law, viz., that every reasonable condition is also implied; and it seems to me reasonable that the party who seeks to put an end to the contract because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them." Jones v. Gibbon (1853), 8 Exch. 920, 22 L. J. R. (N. S.) Ex. 347, 20 Eng. L. & Eq. 559 (the two latter reports differ from the first in language).

² Ellis v. Thompson, 3 M. & W. 445; American Extract Co. v. Ryan (1894), 104 Ala. 267, 15 S. R. 807; White v. Pease (1897), 15 Utah, 170, 49 Pac. R. 416 [citing Everett v. Taylor, 14 Utah, 242; Farr v. Swigart, 13 Utah, 150; Dubois v. Spinks (Cal.), 46 Pac. R. 95; Hill v. Hobart, 16 Me. 164]; Derosia v. Winona, etc. R. Co. (1872), 18 Minn. 133; Pinney v. Railroad Co. (1872), 19 Minn. 251; Walden v. Murdock (1863), 23 Cal. 540, 83 Am. Dec. 135; Woods v. Miller (1880), 55 Iowa, 168, 39 Am. R. 170.

In Pinney v. Railroad Co., *supra*, it is said: "Whether the question of reasonable time is one of fact for the jury or law for the court must depend upon the circumstances of each

ter can be ascertained from the language of the contract, it may be determined by the court as a matter of law.¹

§ 1133. —. If the contract rests wholly in parol, then the question of reasonable time depends, like the other elements of the contract, upon the parol evidence; but where the contract is in writing but is silent as to the time, then the law supplies the omission by implying a reasonable time; and though the facts may be shown as bearing upon the construction, the contemporaneous agreements of the parties are not admissible.²

particular case. If, from the facts found, or undisputed, in a particular case, the court can draw the conclusion as to whether the time is reasonable or not, by the application of any legal rules or principles, the question is one of law. But if the circumstances be numerous and complicated, and such as to exclude the application of any general principle or definite rule of law, it is necessarily one of mere fact to be determined by the jury."

¹ In *Wright v. Bank of the Metropolis* (1888), 110 N. Y. 237, 18 N. E. R. 79, 1 L. R. A. 289, 6 Am. St. R. 356, *Mechem's Cas. on Damages*, 469, it is said: "What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts is a question of law. See *Colt v. Owens*, 90 N. Y. 368; *Hedges v. Hudson Riv. R. Co.*, 49 N. Y. 223." Accord: *Aymar v. Beers* (1827), 7 Cow. (N. Y.) 705, 17 Am. Dec. 538; *Gilmore v. Wilbur* (1831), 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Morse v. Bellows* (1835), 7 N. H. 549, 28 Am. Dec. 372; *Howe v. Huntington* (1839), 15 Me. 350; *Greene v. Dingley* (1844), 24 Me. 131; *Echols v. Railroad Co.* (1876), 52 Miss. 610.

² In *Ellis v. Thompson* (1838), 3 Mees. & Wels. 445, it was said by Alderson, B.: "This was a contract for delivery of two hundred tons of Bog Mine lead, which, according to the terms of the contract, was deliverable in London. There was no specification in the contract as to the time when the delivery is to take place, and therefore the law would imply that the delivery should take place within a reasonable time; and it is a question for the jury at the trial, and this was the question put to them, how the reasonable time, which is an implied part of the contract, is to be ascertained. It seems to me the correct mode of ascertaining what reasonable time is in such a case as this, is by placing the court and jury in the same situation as the contracting parties themselves were in at the time they made the contract; that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made, and under which the contract itself took place."

Where the contract in writing is silent upon the subject of time the law implies a reasonable time, and

§ 1134. Delivery where time is agreed upon — Construction of terms.— Instead of leaving the law to imply the time of delivery, the parties may determine it or attempt to determine it by their contract. In choosing the language to express their agreement, or in making the agreement itself, they may have definite dates in mind or merely ideas expressive of speedy delivery. They may therefore declare that the delivery shall take place “as soon as possible,” or “forthwith” or “immediately;” or “on” or “by” or “up to” or “about” a certain day, or “within” a given time or “before” a given date.¹

parol evidence of a contemporaneous agreement fixing the time is not admissible. *Stange v. Wilson* (1868), 17 Mich. 342 (disapproving of *Cocker v. Franklin Mfg. Co.*, 3 Sumn. 530, and approving of *Ellis v. Thompson*, *supra*, “which rests upon entirely different principles, and which announces the true doctrine, that the facts on which the parties acted, and the assertions of one concerning the existence of facts on which the other relied, may always be shown to explain their conduct and to show the basis of their action. Proof of facts is a very different matter from proof of promises;” *Coon v. Spaulding*, 47 Mich. 162.

¹ “About” a given date.— Where the contract was for delivery “about November 1,” the court said: “The word ‘about’ before the date of delivery and payment in these contracts has significance and must have effect. About November 1st does not mean on November 1st, and this word gave to the party at least until midnight of that day in which to perform his contract.” *Smiley v. Barker* (1897), 83 Fed. R. 684, 28 C. C. A. 9, 55 U. S. App. 125. An agree-

ment to deliver in “about two weeks” is not performed by an offer to deliver in about two months. *Campbell Printing Press Co. v. Marsh* (1894), 20 Colo. 22, 36 Pac. R. 799.

“All convenient speed” means reasonable dispatch. *Gill v. Browne*, 53 Fed. R. 394, 3 C. C. A. 573.

“As soon as possible.”— Where an order for goods stipulated that they were to be shipped “as soon as possible,” but it appeared from the order that the seller would have to do certain work upon them to prepare for them for shipment, it was held that the words “as soon as possible” could not be construed as *forthwith*, but meant within a reasonable time. *Tufts v. McClure*, 40 Iowa, 317. To do a thing “as soon as possible” implies an undertaking to do it in the shortest practicable time. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670, distinguishing if not reconciling *Attwood v. Emery*, 1 Com. B. (N. S.) 110, where an order to a manufacturer for delivery “as soon as possible” was construed to mean as soon as he could, regard being had to the condition of his business and prior orders.

All of these terms require construction, and, as to such terms as "forthwith," "immediately," "as soon as possible," and the like, it must be construction in view of the circumstances of the case and the situation of the parties. Each of these expres-

"As soon as possible" means with quick dispatch. *Egan v. Barclay Fibre Co.*, 61 Fed. R. 527.

"At once or as soon as possible."

A contract to deliver a harvesting machine only twenty-eight miles away "at once or as soon as possible" is not performed by a delivery delayed more than two weeks. *Robinson v. Brooks* (1889), 40 Fed. R. 525.

"At once" means with greater celerity than in a reasonable time. *Lewis v. Hofer*, 16 N. Y. Supp. 534; *Fisher v. Boynton* (1895), 87 Me. 395, 32 Atl. R. 995.

"Directly."—A contract to be performed "directly" means to be performed, not "within a reasonable time," but "speedily," or at least "as soon as practicable." *Duncan v. Topham* (1849), 8 Com. B. 225. See also *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. R. 13, 59 Am. R. 509 (noted below under head of "Promptly").

"Forthwith."—Where the contract was to supply a vessel and take on a cargo, it was held that "forthwith" could not be construed to mean "immediately," but within "a reasonable time." *Roberts v. Brett* (1865), 11 H. L. Cas. 337. "Forthwith" when applied to the performance of an act means that it shall be performed as soon as by reasonable exertion confined to that object it might be. *Anderson v. Goff* (1887), 72 Cal. 65, 1 Am. St. R. 34. Where the contract provided for delivery of the goods "forthwith" and for payment within fourteen days, it

was held that this evidently contemplated delivery before payment and that delivery must be made within fourteen days. *Staunton v. Wood* (1851), 16 Q. B. (Ad. & El., N. S.) 638, 71 Eng. Com. L. 637.

"Next year."—A stipulation for delivery "next year," where the goods were to be transported by water, means the shipping season of next year; it is satisfied by delivery at any reasonable period during that year, and the choice of the time rests with the seller who has to make the delivery. *Dingley v. Oler* (1885), 117 U. S. 490.

"Spring shipment."—Where there was a contract for wood and lumber, which was to be cut out and made ready for "spring shipment," the court, in construing this term, said that the expression might refer to the three spring months as the calendar gives them, or it might, more popularly, refer to the period when vegetation begins to put forth, but no meaning which could be given to it could, as a matter of law, make it extend beyond the 1st of July. *Parker v. Selden* (1897), 69 Conn. 544, 38 Atl. R. 212.

"Immediately."—In *Neldon v. Smith* (1873), 36 N. J. L. 148, it was held that a stipulation for "immediate delivery" naturally meant a delivery forthwith, but that it was open to explanation that the custom of the trade made it mean a delivery within the present, or, in some cases, the succeeding month. In *Rommel v. Wingate* (1869), 103 Mass. 327, the

sions may be somewhat indefinite in meaning, but they all are expressive of promptness to a greater degree than would ordinarily be indicated by such a phrase as "a reasonable time," though under peculiar circumstances they may mean no more.

§ 1135. — **Month — Day.**— Where the contract refers to "months" it is usually construed as meaning calendar months;¹ if "days" are referred to, successive days, including Sundays, are deemed to be intended unless the contract indicates the contrary.² If, however, the last day of performance falls on Sunday, it is excluded in the estimate.³

§ 1136. — **Computation of time.**—In computing the time; the day on which the contract is made, or other day from which

plaintiff wrote he had a cargo which he could load on Monday. On Monday buyer telegraphed an order for shipment "immediately." The goods were not shipped until nine days later. *Held*, too late; that buyer was not bound to accept a cargo "which could not be shipped substantially as speedily as proposed" by the seller. In *Woods v. Miller* (1880), 55 Iowa, 168, 39 Am. R. 170, the sellers in response to an order telegraphed that they would fill the order "immediately." They were not in condition to do so and were not for eight days. They then sent the goods. *Held*, too late. So in *Rhodes v. Cotton* (1897), 90 Me. 453, 38 Atl. R. 367, where an order for immediate shipment was received on May 1st and filled on May 18th, the delay was held unreasonable.

"Immediately" means promptly. *McCormick Co. v. Brower*, 88 Iowa, 607, 55 N. W. R. 537.

"Promptly."—A contract for "prompt shipment" or for goods to be "promptly shipped" means shipment immediately or at once, and is not excused by the freezing of the river from which seller chooses to

ship them. *Tobias v. Lissberger*, 105 N. Y. 404, 59 Am. R. 509, 12 N. E. R. 13.

Where an order was given to and accepted by sellers in Boston for a carload of goods "to be shipped prompt," it was held that this required a shipment from Boston or its vicinity in such time that the goods would arrive with reasonable dispatch, and would not be satisfied by ordering the goods from a distant State, whence a month or more would be required for their journey. *Soper v. Creighton* (1900), 93 Me. 564, 45 Atl. R. 840, 74 Am. St. R. 375.

¹ *Leffingwell v. White* (1799), 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97, and note; *Churchill v. Merchants' Bank* (1837), 19 Pick. (Mass.) 532; *Webb v. Fairmaner* (1838), 3 Mees. & Wels. 473.

² *Salter v. Burt* (1838), 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; *Brown v. Johnson* (1842), 10 Mees. & Wels. 331; *Disney v. Furness, Withy & Co.*, 79 Fed. R. 810.

³ *Salter v. Burt*, *supra*, followed in *Stebbins v. Leowolf* (1849), 3 Cush. (Mass.) 137.

the computation is to begin, is usually excluded,¹ but the day of performance is included.² The last day is, however, generally held to be excluded by such expressions as "until," "up to" or "between,"³ though "to" is sometimes held to include and sometimes to exclude the date fixed.⁴ "On or before" a given date usually permits performance at any time up to and including the date named.⁵

§ 1137. — **Hour of day.**—With respect of the hour in the day at which a delivery or tender of delivery may lawfully be made, the rule laid down by Baron Parke in the leading case upon the subject⁶ is, that if the delivery by the terms of the

¹ *Shelton v. Gillett*, 79 Mich. 173, 44 N. W. R. 428; *Vogel v. State*, 107 Ind. 374, 8 N. E. R. 164; *Seekonk v. Rehoboth*, 8 Cush. (Mass.) 371; *Bemis v. Leonard*, 118 Mass. 502; *Farwell v. Rogers*, 4 Cush. 460.

² See *Pease v. Norton* (1830), 6 Me. 229.

³ See *Newby v. Rogers* ('72), 40 Ind. 9.

"Between" two days usually excludes both. *Cook v. Gray*, 6 Ind. 335.

"Until" a given day may either include or exclude it, according to circumstances. *Conway v. Smith Mercantile Co.*, 6 Wyo. 327, 44 Pac. R. 940; *Nichols v. Ramsel*, 2 Mod. 280; *Bruce v. Reed*, 16 Barb. 347; *People v. Walker*, 17 N. Y. 502; *Kendall v. Kingsley*, 120 Mass. 95.

⁴ In *Newby v. Rogers*, *supra*, under a contract to deliver property "from the 15th to the 28th" of a specified month, both days were excluded.

But the last day was included under a contract to deliver "at any time from this date to December 31st," in *Conawingo Refining Co. v. Cunningham* (1874), 75 Pa. St. 138.

A contract to deliver goods at seller's option "during the first half of August next" can only be performed by a delivery thereof by noon of

August 16th. August having thirty-one days, the parties have divided the day by the terms of their contract. *Grosvenor v. Magill* (1865), 37 Ill. 239; *Kirkpatrick v. Alexander* (1877), 60 Ind. 95.

⁵ *Adams v. Dale*, 29 Ind. 273. In *Clark v. Lindsay* (1896), 19 Mont. 1, 47 Pac. R. 102, a contract was made for the sale of merchandise which required the vendor to ship the goods free on board the cars on or before a certain date, and it was held to be a sufficient compliance when the vendor placed the goods on board the cars at the designated point on the date named, whether or not the carrier moved the car forward toward its destination before the expiration of the day named.

⁶ *Startup v. Macdonald* (1843), 6 Man. & Gr. 593, 46 Eng. Com. L. 591. In this case the plaintiff had sold to the defendant ten tons of linseed oil, "to be free delivered within the last fourteen days of March, and paid for at the expiration of that time, in cash." The defendant pleaded to an action for not receiving the oil that the tender was made on the last of the fourteen days, at nine o'clock at

contract is to be made at a particular place, at which the vendee is bound to attend for the purpose of receiving it, then a delivery or tender at that place must be made by daylight and at a convenient time before sunset; but where the delivery or tender

night, which was an unreasonable and improper time, etc. The jury found, as a special verdict, that the plaintiff made the tender at half-past eight o'clock at night on the 31st of March, that day being Saturday; that there was full time before twelve o'clock at night for the defendant to examine and weigh and receive the oil, but that he objected on the ground that the tender was at an unreasonable hour; that the plaintiff then kept the oil, and tendered it again on Monday morning at seven o'clock; and that the hour of half-past eight on Saturday night was an improper and unreasonable time of that day for the tender and delivery of the oil. On these facts the court of common pleas had been unanimous in favor of the defendant, but the judgment was reversed in *Cam. Scac.* The judges, Denman, C. J., Abinger, C. B., Pattison and Williams, JJ., and Parke, Gurney, Rolfe and Alderson, BB., were unanimously of opinion that the defendant was not bound to be present at the hour when the tender was made; but all were also of opinion (with the exception of Lord Denman, who dissented) that, being there, he was bound by the tender; and that the verdict of the jury, declaring that the tender was at an unreasonable and improper time, was an erroneous finding of the law, inconsistent with their finding of the fact that the tender was made in full time for the defendant to examine, weigh and receive the oil before midnight. Parke,

B., in stating the law upon this subject said: "The question in this case is merely, what is the proper time of the day for a tender of goods, under a contract to sell and deliver to another within a certain number of days, the mode of tender being in other respects reasonable and proper (for it is found to be unreasonable only in respect of the lateness), the tender being made to the vendee personally, and there being no usage of trade as to the time for delivery, to qualify or explain the contract. . . . Upon a reference to the authorities, and due consideration for them, it appears to me that there is no doubt upon this question. It is not to be left to the jury to be determined as a question of practical convenience or reasonableness in each case, but the law appears to have fixed the rule, and it is this: that a party who is by contract to pay money or to do a thing transitory to another, anywhere, on a certain day, has the whole of the day, and, if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract. In such a case the party bound must find the other at his peril, and within the time limited, if the other be within the four seas, and he must do all that, without the concurrence of the other, he can do to make the payment or perform the act; and that, at a convenient time before midnight, such

may be made anywhere, then a delivery or tender to the party may be made at any convenient hour before midnight. What this convenient hour shall be must depend upon the circumstances of the case, the nature of the goods and the situation of the parties. "The rule," said Allen, J., in dealing with this question, "is that a tender of bulky articles in the performance of an agreement must be seasonably made, so that the person

time varying according to the quantum of the payment or nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time; and it is by the fault of the other only that the payment or delivery is not complete.

"But where the thing is to be performed at a certain place, on or before a certain day, to another party to a contract, there the tender must be to the other party at that place; and as the attendance of the other party is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day when the thing is to be done on one day, or for the whole series of days where it is to be done on or before a certain day, and therefore it fixes a particular part of the day for his presence; and it is enough if he be at the place at such a convenient time before sunset on the last day, as that the act may be completed by daylight; and if the party bound tender to the party there, if present,

or if absent be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient; and if the tender be made to the other party at the place at any time of the day, the contract is performed; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary; and if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good. See Bacon's Abr., tit. Tender, D. (a); Co. Lit. 202a. This is the distinction which prevails in all the cases,—where a thing is to be done anywhere, a tender at a convenient time before midnight is sufficient; where the thing is to be done at a particular place, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset. . . . I therefore think that the tender was good in this case in point of time, and consequently that the plaintiff, having been able to meet with the defendant, and actually to tender the oil to him a sufficient time before midnight to enable the defendant to receive, examine and weigh the oil, performed

may have an opportunity to examine the articles tendered, and see that they are such as they purport to be, and such as he is entitled to demand, before the close of the day on which the delivery is to be made. Whether the tender should be made before sunset may depend upon circumstances; . . . but when daylight is required for the proper examination and assortment of the goods tendered, there can be but little doubt that time should be given the tenderee for such examination before sunset and by daylight.”¹

§ 1138. — Time of the essence of the contract.— Where the time for the performance is thus fixed, it is, in the language of the law, deemed usually² to be “of the essence of the contract,”³ and, unless waived by the other party, performance at

as far as he could his part of the contract, and was entitled to recover for the breach of it by the defendant.” To like effect, see *Sweet v. Harding* (1847), 19 Vt. 587.

¹ *Corninger v. Crocker* (1875), 62 N. Y. 151. In this case a tender of a large quantity of wool at 10 o'clock at night on the last day of delivery, the wool being stored in the warehouse of a third person, who refused access to it with a light because it would invalidate his insurance, was held insufficient.

A buyer of cotton, who contracted to receive and pay for a certain number of bales of cotton at so much per pound, when notified that it was ready for delivery on a plantation, performs on his part, if he is ready and offers to receive any pay for the cotton at the appointed place, a half-hour after sunset of the last day on which he was entitled to demand delivery, if sufficient time intervenes between such demand and midnight to make proper delivery, without danger of loss or destruction to the article in handling at such time in the night. *Berry v. Nall* (1875), 54 Ala. 446.

² Thus, see *Higgins v. Delaware, L. & W. R. Co.* (1875), 60 N. Y. 553; *Sun Pub. Co. v. Minnesota Type Foundry Co.* (1892), 22 Oreg. 49, 29 Pac. R. 6. But in *Woolfe v. Horne* (1877), 2 Q. B. Div. 355, a stipulation that goods purchased at an auction sale should “be cleared away within three days after the sale” was held not a condition precedent to the buyer's right to claim the goods.

³ *Norrington v. Wright* (1885), 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. R. 12; *Cleveland Rolling Mills v. Rhodes* (1887), 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. R. 882; *Jones v. United States* (1877), 96 U. S. 24, 24 L. ed. 644; *Filley v. Pope* (1885), 115 U. S. 213, 29 L. ed. 372, 6 Sup. Ct. R. 19; *Davison v. Von Lingen*, 113 U. S. 40, 28 L. ed. 885, 5 Sup. Ct. R. 346; *Bowes v. Shand* (1877), 2 App. Cas. 455; *Camden Iron Works v. Fox* (1887), 34 Fed. R. 200; *Cromwell v. Wilkinson* (1862), 18 Ind. 365; *Booth v. Rolling Mill Co.* (1875), 60 N. Y. 487; *Salmon v. Boykin* (1887), 66 Md. 541, 7 Atl. R. 701; *Crane v. Wilson* (1895), 105 Mich. 554, 63 N. W. R. 506.

the time stipulated is indispensable. It is not necessary that it shall be so declared in express terms; it is enough if it is a term of the contract. "In the contracts of merchants," said Mr. Justice Gray, in a leading case¹ before the supreme court of the United States, "time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."

§ 1139. — Performance at time a condition precedent.

Obviously, therefore, unless the seller can show that he did what was incumbent upon him to do, as that he delivered, shipped or tendered the goods at the time when such performance was due,—neither later nor earlier,—or that performance at that time was waived by the other party, he is in no situation either to enforce the contract on his own behalf² or resist an action against him by the other party. On the other

¹ *Norrington v. Wright, supra.*

² Under a contract for goods to be shipped "during the months of March and (or) April," a shipment in February is not a compliance. *Bowes v. Shand* (1877), 2 App. Cas. 455. Under a contract to ship by first vessel from one port, it is not a compliance to ship by first vessel from another port, from which the goods arrive earlier than if shipped from the port agreed upon. *Filly v. Pope, supra.* Under a contract to ship "about one thousand tons per month," the seller is bound to make monthly shipments. *Norrington v. Wright, supra.* Under a contract to ship in one of two cer-

tain months, it is no performance to ship in a later month. *Salmon v. Boykin* (1887), 66 Md. 541, 7 Atl. R. 701. To same effect: *Welsh v. Gossler*, 89 N. Y. 510; *Hill v. Blake*, 97 N. Y. 216; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. R. 13; *Clark v. Fey*, 121 N. Y. 470, 24 N. E. R. 703.

Defendants sent an order for goods with date of shipment left blank. The next day they telegraphed the date. When plaintiff entered the order it had both the letter and the telegram. *Held*, that plaintiff could not recover for goods sent after the date so fixed. *Camden Iron Works v. Fox*, 34 Fed. R. 200.

hand, if he has performed, or been ready and willing to perform when performance was due, he is entitled to enforce the contract against the buyer.¹

§ 1140. **Delivery by instalments — Breach of one of successive performances.**—Closely allied to the questions considered in the preceding sections is that arising where a contract for delivery or payment in instalments is broken by a failure to deliver or to pay some instalment as agreed; and it is contended that such failure by one party relieves the other from the necessity of further performance on his part. The failure of the *seller* may be in not delivering an instalment either in the *time*, or the *amount*, or the *quality* agreed upon; the failure of the *buyer* may be in not paying an instalment in the *time*, or the *amount*, or the *manner* agreed upon. The question of the duty and default of the buyer may belong more appropriately to subsequent chapters; but inasmuch as the principles seem substantially the same in either case, and the default of one leads often to the alleged default of the other in such a way as to commingle both questions almost inextricably, both will be considered together.

The question, briefly stated, is, Does the default of one party in delivering or paying one instalment justify the other in treating the contract as at an end, or must the latter continue performance on his own part, relying on his action for damages to compensate him for the breach by the former?

§ 1141. — **The English rule.**—The English courts have had occasion to deal with the question in a variety of cases,² and the results arrived at have not always been harmonious or

¹ If the seller offered the goods at the time and place specified, it is no defense that the buyer was not there to receive them. *Barton v. McKelway*, 22 N. J. L. 165; *Case v. Green*, 5 Watts (Pa.), 262, 30 Am. Dec. 311. And where shipments are made at the time specified, the shipper is not responsible for delay in arrival. *Peace*

River Phosphate Co. v. Grafflin, 58 Fed. R. 550.

² In *Hoare v. Rennie* (1859), 5 H. & N. 19, 29 L. J. Ex. 73, the plaintiffs agreed to sell to the defendants six hundred and sixty-seven tons of iron, and deliver the same in four monthly portions, each about one-fourth the entire quantity. But during the first

satisfactory. In a very recent case, however, the question was elaborately discussed in a controversy arising from the non-payment by the buyer of an instalment due, though no distinction was made between such a default and one by the seller,

month they shipped but twenty-one tons, which the defendants refused to accept. The pleas averred that the shipment was not in accordance with the contract, and the court held that the defendants were entitled to judgment on the pleas. Pollock, C. B., said: "At the outset the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for."

In *Jonassohn v. Young* (1863), 4 B. & S. 296, 32 L. J. Q. B. 385, the plaintiffs agreed to sell and the defendant to purchase as much of the plaintiffs' gas coal equal to sample as could be carried from Sunderland to London, in a steam vessel to be furnished by defendant, during nine months. The defendant pleaded that, before any breach on his part, the plaintiffs broke their contract by detaining the defendant's vessel an undue and unreasonable time, upon which the defendant refused to receive any more of the coal, and further, that part of the coal offered was inferior to sample. Upon demurrer these pleas were held bad.

In *Simpson v. Crippin* (1872) L. R. 8 Q. B. 14, the defendants agreed to supply the plaintiffs with from six thousand to eight thousand tons of coal, to be delivered into the plaintiffs' wagons at the defendants' coleries, in equal monthly quantities

during the period of twelve months, at a fixed price per ton. During the first month the plaintiffs sent wagons to receive only one hundred and fifty-eight tons. At the end of the first month the defendants immediately informed the plaintiffs that they would annul the contract, as the plaintiffs had taken much less than the contract called for. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. The court held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. Mellor, J., was inclined to follow *Hoare v. Rennie*, which he could not distinguish from the case at bar, but *Blackburn and Lush, JJ.*, declared that they could not understand the principle on which that case was decided, and refused to follow it.

In *Freeth v. Burr* (1874), L. R. 9 C. P. 208, the defendant contracted to sell the plaintiffs two hundred and fifty tons of pig iron, half to be delivered in two and the remainder in four weeks, payment net cash fourteen days after delivery of each parcel. The market was rising, and, notwithstanding urgent demands by the plaintiffs, the delivery of the first one hundred and twenty-five tons was not completed for nearly six months. The plaintiffs refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other

and the court laid down the principle by which such cases are to be determined in the English courts. That principle, stated in the language of Chief Justice Coleridge, who first announced it,¹ is this: "In cases of this sort, where the question is whether

iron in consequence of the defendant's default; but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, declined to deliver any more. The court held that under these facts the defendant was not warranted in treating the contract as abandoned by the plaintiffs.

In *Brandt v. Lawrence* (1876), 1 Q. B. D. 344, C. A., the defendant entered into two contracts, each of which was for the purchase from the plaintiff of four thousand five hundred quarters of Russian oats, more or less, "shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after reopening of navigation." The plaintiff shipped on board one steamer four thousand five hundred and eleven quarters to answer the first contract, and one thousand one hundred and thirty-nine quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late. The court held that the purchaser was bound to accept the portion of the goods, intended to apply on the second contract, which was shipped in time, since a division of the

goods was evidently contemplated in the term "by steamer or steamers."

Reuter v. Sala (1879), 4 C. P. D. 239, C. A., was a case in many ways very similar to *Brandt v. Lawrence*, though the majority of the court held that it did not fall within the same principle. The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October and (or) November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. On the 19th of January, 1877, the plaintiffs, purporting to act in pursuance of the contract, declared by a vessel called the "Borga," five hundred bags of black Penang pepper, which would be equal in weight to about twenty-five tons, in three parcels, the subject of separate bills of lading — namely, two hundred and eighty-five and one hundred and ten bags under bills of lading dated the 29th of November, 1876, and one hundred and five bags under a bill of lading dated the 11th of December, 1876. In point of fact the shipment of the one hundred and five bags, equivalent to about five tons, had not been made until the month of December; and on the 30th of January, 1877, the defendants wrote that they would not accept the declaration. The plaintiffs argued that, as the pepper tendered was shipped under three separate bills of

¹ *Freeth v. Burr*, L. R. 9 C. P. 208, *supra*.

the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I

lading, and was so declared, the declaration and tender, although one in fact, might be treated as severable in law, and consequently that the defendants were bound to accept the twenty tons, which, upon this hypothesis, were properly declared and tendered. But Thesiger, L. J., said: "I cannot assent to this argument. . . . The present contract ought and must, in my opinion at least, involve this consequence, namely, that where the sellers elect to ship by one vessel the whole quantity contracted to be sold, and declare their election to the buyers, still more when they follow up their election and declaration by tendering the whole quantity pursuant to their declaration, they cannot, after it is discovered that as to a portion of the quantity shipped it was not shipped in accordance with the terms of the contract, and that the buyers are not bound to accept that portion, turn round and call upon them to accept the remaining portion of the quantity shipped, which though physically separable, and the subject of distinct bills of lading, yet had always been treated by the sellers as part of one entire whole, which the buyers by the declaration were told to treat, and by the tender were called upon to accept, as one entire whole." This case was accordingly held not to fall within the principle of *Brandt v. Lawrence*, for while in both cases the shipment was to be by vessel or vessels, in the earlier case the goods were actually separated in this man-

ner, as contemplated by the contract, but in the case at bar the option to separate by such shipment had not been exercised by the seller.

Brett, L. J., was, however, of the opinion that this case should not be distinguished from *Brandt v. Lawrence*. In a dissenting opinion he said: "It seems to me that the principle to be deduced from these cases is that where, in a mercantile contract of purchase and sale of goods to be delivered and accepted, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfill his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfill his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part; that the other party should have been or should be always ready, and willing,

say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question

and able to accept and tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and to condemn the other. Suppose, in the case of shipments, the seller has by contracts made abroad provided for all the successive shipments, and has taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfill his contract, so that the first shipment fails, the purchaser under the main contract we are discussing may, upon one construction suggested, throw up the whole contract, although he could be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without any compensation. So if the purchaser has made contracts, and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensation. Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or seller might at once cancel the whole contract, to the irreparable loss of the other party, although he himself might be amply compensated by a payment in damages; or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the whole of the

remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations show that the rule of construction adopted by the courts is as sound on mercantile as it is on legal considerations, and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question of the time or mode of payment has nothing to do with the reasoning for or against either view; moreover, it is most important, in my opinion, that the construction of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on slight variations either in the terms or the conditions of each particular contract."

In *Honck v. Muller* (1881), 7 Q. B. D. 92, C. A., the defendant, in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, two thousand tons of pig iron at 42s. a ton, to be delivered to the plaintiff free on board at maker's wharf, "in November, 1879, or equally over November, December and January next, at 6d. per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to be entitled to delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was canceled by the plaintiff's breach to take any iron in No-

is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

§ 1142. —. Stated in the language of the Earl of Selborne, in the House of Lords,¹ in approving and applying Lord Coleridge's rule, it is, that "you must look at the actual cir-

cumstances. The majority of the court (Bramwell and Baggallay, L. JJ.) held that since no delivery at all had been accepted in November, and the contract had therefore been broken before it had been even partially performed, the plaintiff had no right to insist subsequently upon performance of a part. *Hoare v. Rennie* was approved and followed, Bramwell, L. J., holding that it was distinguishable from *Simpson v. Crippin*, and Baggallay, L. J., failing to distinguish it, but preferring it to the other case. Brett, L. J., dissented from the opinion of the court and approved *Simpson v. Crippin* as directly opposed to *Hoare v. Rennie*.

In *Mersey Steel & Iron Co. v. Naylor* (1884, 9 App. Cas. 434, the respondents bought from the appellant company five thousand tons of steel of the company's make, to be delivered one thousand tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of the instalment for that month, and in the beginning of February made a further delivery. Shortly before payment on these deliveries became due a petition was presented to wind up the company, and under the erro-

neous but *bona fide* advice of their solicitor the purchasers declined to pay without an order from the court. A correspondence ensued between the purchasers and the liquidator who was soon afterward appointed, in which the purchasers claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages. The court held, in accord with the decision of the court of appeal, that payment for a previous delivery was not a condition precedent to the right to claim the next delivery; and that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance.

¹ *Mersey Steel & Iron Co. v. Naylor* (1884, 9 App. Cas. 434, affirming 9 Q. B. Div. 648, C. A.

cumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

§ 1143. — And Lord Blackburn, who also approved the principle, stated it, in the same case, in this way: "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defense to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"

§ 1144. — **The rule in the United States.**—In the United States the authorities are likewise much in conflict, and there is, of course, no tribunal which can authoritatively settle the question for the whole country. The supreme court of the United States has, however, recently given the subject careful consideration,¹ and attempted to reconcile its view with that of the House of Lords in the case referred to in the preceding section, though this effort is said by the learned English editors of Benjamin on Sale to be based upon "an entire misapprehension of the *ratio decidendi*" of the English case.

¹In *Norrington v. Wright* (1885), 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. R. 12; approved and followed in *Cleveland Rolling Mill v. Rhodes* (1886), 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. R. 882; *Pope v. Porter* (1886), 102 N. Y. 366, 7 N. E. R. 304; approved but distinguished in *Clark v. Wheeling Steel Works*, 3 U. S. App. 358, 3 C. C. A. 600, 53 Fed. R. 494; approved and followed in *Cresswell Ranch Co. v. Martindale* (1894), 27 U. S. App. 277, 11 C. C. A. 33, 63 Fed. R. 84; *Cherry Valley Iron Works v. Florence Iron River Co.*, 22 U. S. App. 655, 12 C. C. A. 306, 64 Fed. R. 569.

§ 1145. — **Norrington v. Wright — Default in delivery.**

The case¹ before the supreme court involved the failure of the seller to deliver instalments of iron, a definite quantity of which he had agreed to deliver in certain amounts monthly, to be

¹ *Norrington v. Wright* (1885), 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. R. 12, *supra*.

This was an action of *assumpsit*, brought by *Norrington*, a citizen of Great Britain, against *Wright* and others, citizens of Pennsylvania, upon the following contract:

"PHILADELPHIA, Jan. 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of A. *Norrington & Co.*, London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars (\$45.00) per ton of 2240 lbs. custom-house weight, *ex ship Philadelphia*. Settlement, cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

"EDWARD J. ETTING,

"Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about five thousand tons of T iron rails, to be shipped at the rate of about one thousand tons a month, beginning in February and ending in July, 1880. The second count set forth the contract *verbatim*. Each

of these two counts alleged that the plaintiffs in February, March, April, May, June and July shipped the goods at the rate of about one thousand tons a month and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that four hundred tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs, at the rate of about one thousand tons a month, in March, April, May, June and July. The defendants pleaded *non assumpsit*. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports four hundred tons by one vessel in the last part of February, eight hundred and eighty-five tons by two vessels in March, one thousand five hundred and seventy-one tons by five vessels in April, eight hundred and fifty tons by three vessels in May, one thousand tons by two vessels in June, and three hundred tons by one vessel in July, and notified to the defendants each shipment. The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be dis-

paid for as received. The court held that the contract was a single one for the entire quantity and was not split up into several contracts by the provisions for delivery and payment in instalments. Time and quantity were held to be of the

charged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March and April, they gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not

for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are

essence of the contract, and performance as agreed a condition precedent. "The seller," said the court, "is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to

absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know

quite as well as we do what is the rule and its uncertainty of application." On June 10th Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined. On June 15th Etting wrote to the defendants that two cargoes, amounting to two hundred and twenty-one tons, of the April shipments, and two cargoes, amounting to six hundred and fifty tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about nine hundred tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken. From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended (1) that under the contract he had six months in which to ship the five thousand tons, and any deficiency in the earlier months could be made up subsequently, provided that the de-

select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the

defendants could not be required to take more than one thousand tons in any one month; (2) that, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff. But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about one thousand tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Said the court, per Gray, J.: "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 Best & S. 751; *Bowes*

v. Shand, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728; *Davison v. Von Lingen*, 113 U. S. 40; s. c., 5 Sup. Ct. 346.

"The contract sued on is a single contract for the sale and purchase of five thousand tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. *Mersey S. & I. Co. v. Naylor*, 9 App. Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment simply reduces, in the event of such a loss, the quantity to be delivered and paid for. The times of shipment, as designated in the contract, are 'at the rate of about one thousand tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880.' These words are not satisfied by shipping one-sixth part of the five thousand tons, or about eight hundred and thirty-three tons, in each of the six months which begin with February and end with July. But they require about one thousand tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent cir-

buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

cumstances,—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill,—in which case the mention of the quantity, accompanied by the qualification of 'about,' or 'more or less,' is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: 'When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.' *Brawley v. United States*, 96 U. S. 168, 171, 172. The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

"The plaintiff, instead of shipping

about one thousand tons in February and about one thousand tons in March, as stipulated in the contract, shipped only four hundred tons in February, and eight hundred and eighty-five tons in March. His failure to fulfill the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of four hundred tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

"The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract. The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still

§ 1146. — **Pope v. Porter — Default in delivery.**— So, in a late case¹ in the New York court of appeals, where there was a contract for the delivery of iron in two instalments, and

in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

“For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

“In the leading case of *Hoare v. Rennie*, 5 Hurl. & N. 19, which was an action upon a contract of sale of six hundred and sixty-seven tons of bar iron, to be shipped from Sweden in June, July, August and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not

accept the rest. The defendants pleaded that the shipment in June was of about twenty tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron Pollock saying: ‘The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract,—they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.’ 5 Hurl. & N. 28. So in *Coddington v. Paleologo*, L. R. 2 Exch. 193, while there was a division of opinion upon the question whether a contract to supply goods, ‘delivering on April 17th,

¹ *Pope v. Porter* (1886), 102 N. Y. 366, 7 N. E. R. 304.

the seller made default in the delivery of the first one, but offered to deliver the second, which the buyer refused, it was held that he was justified in rescinding the contract. "Here,"

complete 8th of May,' bound the seller to begin delivering on April 17th, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

"On the other hand, in *Simpson v. Crippin*, L. R. 8 Q. B. 14, under a contract to supply from six thousand to eight thousand tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only one hundred and fifty tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt v. Lawrence*, 1 Q. B. Div. 344, in which the contract was for the purchase of four thousand five hundred quarters, ten per cent. more or less, of Russian oats, 'shipment by steamer or steamers during February,' or, in case of ice preventing shipment, then immediately upon the opening of navigation, and one thousand one hundred and thirty-nine quarters were shipped by one steamer in time, and three thousand three hundred and sixty-one quarters were shipped too late, it was held that the buyer was bound to accept the one thousand one hundred and thirty-nine quarters, and was liable to an action by the seller for refusing to accept them. Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand*, after conflicting decisions in the queen's bench divis-

ion and the court of appeal, was finally determined by the house of lords. 1 Q. B. Div. 470, 2 Q. B. Div. 112, 2 App. Cas. 455. In that case two contracts were made in London, each for the sale of three hundred tons of 'Madras rice, to be shipped at Madras or coast for this port during the months of March and (or) April, 1874, per *Rajah of Cochin*.' The six hundred tons filled eight thousand two hundred bags, of which seven thousand one hundred and twenty bags were put on board, and bills of lading signed in February; and for the rest, consisting of one thousand and thirty bags put on board in February, and fifty in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the house of lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months. In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

"Lord Chancellor Cairns said: 'It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face

said the court, "there is a breach of the contract at the beginning; a failure to perform at the outset; and that breach justifies a rescission by the vendee. But a rescission of what?

of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.' 2 App. Cas. 463. 'If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning,—it is no observation which can dispose of, or get rid of, or displace, that literal meaning,—to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.' Pages 465, 466. 'It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them

if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not three hundred tons of rice in gross or in general. It is three hundred tons of Madras rice to be put on board at Madras during the particular months.' 'The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract.' Pages 467, 468.

"Lord Blackburn said: 'If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good

Obviously, of the entire contract. It must be that or nothing, since there are not two independent and separate contracts, one of which may be broken without peril to the other, but

rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it.' 2 App. Cas. 480, 481.

"Soon after that decision of the house of lords, two cases were determined in the court of appeal. In *Reuter v. Sala*, 4 C. P. Div. 239, under a contract for the sale of "about twenty-five tons (more or less) black pepper, October and (or) November shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading,' the seller, within the sixty days, declared twenty-five tons by a particular vessel, of which only twenty tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Honck v. Muller*, 7 Q. B. Div. 92, under a contract for the sale of two thousand tons of pig-iron, to be delivered to the buyer free on board at the maker's wharf in November, or equally over November, December and January next,' the buyer failed to take any

iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

"The plaintiff in the case at bar greatly relied on the very recent decision of the house of lords in *Mersey Co. v. Naylor*, 9 App. Cas. 434, affirming the judgment of the court of appeal in 9 Q. B. Div. 648, and following the decision of the court of common pleas in *Freeth v. Burr*, L. R. 9 C. P. 208. But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the house of lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment. The lord chancellor said: 'The contract is for the purchase of five thousand tons of steel blooms of the company's manufacture; therefore, it is one contract for the purchase of that quantity of steel blooms. No doubt, there are subsidiary terms in the contract, as to the time of delivery,—'delivery one thousand tons monthly, com-

there is a single contract which may be rescinded at the moment of a breach, so far as it remains wholly unperformed on both sides. . . . The vendee is not compelled to accept a

mening January next,'—and as to the time of payment,—'payment net cash within three days after receipt of shipping documents,'—but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel.' 9 App. Cas. 439.

"Moreover, although in the court of appeal *dicta* were uttered tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie* and *Honck v. Muller*, above cited, yet in the house of lords *Simpson v. Crippin* was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in *Honck v. Muller*, distinguished *Hoare v. Rennie* and *Honck v. Muller* from the case in judgment. 9 App. Cas. 444, 446.

"Upon a review of the English de-

cisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala* and *Honck v. Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the house of lords in *Bowes v. Shand*, while it in nowise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*. In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill v. Blake*, 97 N. Y. 216, which accords with *Bowes v. Shand*, and *King Philip Mills v. Slater*, 12 R. I. 82, which approves and follows *Hoare v. Rennie*. The recent cases in the supreme court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn v. Bodine*, 60 Pa. St. 182, the point decided was that a contract for the purchase of eight hundred tons of coal at a certain price per ton, "coal to be delivered on board vessel as sent for during the months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan v. McKee*, 77 Pa. St. 228, and in *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment was denied,

part performance in the inverse order of his contract, but only according to its terms; and where, at its initial point, the vendor is in default, the right to rescind or abandon belongs to the vendee, and necessarily and justly must apply to the whole contract remaining unperformed. Otherwise the one contract is split into two, each independent of the other."

§ 1147. — **McGrath v. Gegner** — **Default in payment.** — So, in a recent case in Maryland where there was a contract

only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous instalment of the goods. The decision of the supreme judicial court of Massachusetts in *Winchester v. Newton*, 2 Allen, 492, resembles that of the house of lords in *Mersey Co. v. Naylor*.

"Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about one thousand tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, above cited.

"Judgment affirmed."

In *Cleveland Rolling Mills v. Rhodes* (1886), 121 U. S. 255, a merchant agreed in writing with the owner of a rolling mill to sell him "the entire product of fourteen thousand tons iron ore, to be manufactured into

pig-iron with charcoal" at the furnace of a third person, "and shipped in vessel cargoes, as rapidly as possible, during the season of navigation of 1880," to the buyer's mill, and "such portion of the product of said ore as is made after the close of navigation of 1880 is to be shipped on the opening of navigation of 1881, or as near the opening as possible," but the buyer to have the privilege of ordering this portion to be forwarded by railroad during the winter of 1880-81. The whole amount of pig-iron made from the fourteen thousand tons of ore was eight thousand tons, of which three thousand four hundred and twenty-one tons were shipped before the close of navigation in 1880, and accepted and paid for. For want of a sufficient supply of charcoal to keep the furnace at work, only three thousand five hundred and six tons more were made and ready for shipment by the opening of navigation in 1881, and were then shipped as soon as possible; and the remaining one thousand and seventy-three tons were made afterwards and shipped from time to time during the ensuing two months. *Held*, that the buyer might refuse to accept iron shipped in 1881.

¹ *McGrath v. Gegner* (1893), 77 Md. 331, 39 Am. St. R. 415, 26 Atl. R. 502.

In *Norrington v. Wright*, *supra*,

for the sale of a lot of shells in weekly instalments, each of which was to be paid for within a week following its delivery, and the buyer made default in his weekly payments, the court said: "It is clear that the weekly payments were meant and understood by the parties to be an essential part of the contract, and the plaintiff having failed, time and again, to make these payments according to the terms of the contract, the defendant had the right to put an end to the contract, and to refuse to deliver any more shells under it to the plaintiff." And not only may the seller deem the contract at an end, but he may also sue and recover the value of the goods already furnished.¹

§ 1148. — **Weight of authority.**— And, though the cases are not in harmony, this view, that the failure of either party to perform an essential term of the contract gives to the other the right to rescind that contract, is sustained by the clear weight of American authority.²

as will be noticed, the court, in attempting to distinguish *Mersey Co. v. Naylor*, 9 App. Cas. 434, deemed the rule of that case "applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment." "But this," say the English editors of *Benjamin on Sale*, § 593a, "appears to be an entire misapprehension of the *ratio decidendi* of that case, both in the house of lords and in the court of appeal, which lies in the application of a general principle which is equally applicable whether the breach of contract is committed by one or other of the parties to the contract." See also *Cherry Valley Iron Works v. Florence Co.* (1894), 64 Fed. R. 569, 12 C. C. A. 306, 22 U. S. App. 655. But see the full discussion in the very late case of *West v. Bechtel* (1900), — Mich. —, 84 N. W. R. 69, 7 Det. Leg. N. 452.

¹ Default in payment constitutes a breach, and seller may treat the contract as abandoned and recover the value of the goods furnished. *Kokomo Strawboard Co. v. Inman* (1892), 134 N. Y. 92, 31 N. E. R. 248; *Winchell v. Scott* (1889), 114 N. Y. 640, 21 N. E. R. 1119; *Geo. H. Hess Co. v. Dawson* (1894), 149 Ill. 138, 36 N. E. R. 557 [citing *Guerdon v. Corbett* (1877), 87 Ill. 272; *Wilson v. Bauman* (1875), 80 Ill. 494].

² In *Providence Coal Co. v. Cox*e (1896), 19 R. I. 380, 35 Atl. R. 210, it was held that, where a purchaser of coal to be delivered in instalments fails to take the proportions deliverable during several months, he waives his right to insist on performance by the seller during succeeding months.

In *King Philip Mills v. Slater* (1878), 12 R. I. 82, 34 Am. R. 603 [followed in *Providence Coal Co. v. Cox*e (1896), 19 R. I. 380, 35 Atl. R. 210], it is held

§ 1149. — Good faith of the party in default immaterial.— The fact that the party in default acted in good faith, or did not believe that he was violating his contract, is imma-

that a seller who makes default in the quality of the first of successive lots of goods which he undertakes to deliver cannot compel acceptance of subsequent lots. *Simpson v. Crippin*, *supra*, was disapproved. And in *Rugg v. Moore* (1835), 110 Pa. St. 236, 1 Atl. R. 320, the court held that, where the goods are to be paid for at each delivery, the refusal to pay for any delivery, without sufficient cause, authorizes the seller to rescind the contract. *King Philip Mills v. Slater*, *supra*; *Haines v. Tucker*, 50 N. H. 307; *Stephenson v. Cady*, 117 Mass. 6; *Bradley v. King*, 44 Ill. 339, and *Dwinel v. Howard*, 30 Me. 258, were relied on, and *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, 33 Am. R. 753, which is often cited as opposed, was distinguished. *McGrath v. Gegner*, *supra*, is to the same effect. See also *Bollman v. Burt*, 61 Md. 415; *Carney v. Newberry* (1860), 24 Ill. 203; *Kokomo Strawboard Co. v. Inman* (1892), 134 N. Y. 92, 31 N. E. R. 248; *Stokes v. Baars* (1882), 18 Fla. 656; *Robson v. Bohn*, 27 Minn. 333, 341; *Branch v. Palmer*, 65 Ga. 210; *Fletcher v. Cole*, 23 Vt. 114, 119.

On the other hand, *New Jersey*, in *Blackburn v. Reilly* (1885), 47 N. J. L. 290, 54 Am. R. 159, 1 Atl. R. 27 (re-affirmed in *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. R. 83; *Otis v. Adams*, 56 N. J. L. 38, 27 Atl. R. 1092; *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432, 31 Atl. R. 401, 51 Am. St. R. 611), follows the English rule of *Mersey Steel & Iron Co. v. Naylor*.

So does *Iowa*. See *Myer v. Wheeler* (1884), 65 Iowa. 390, 21 N. W. R. 692 [where it is said that "the rule es-

tablished by the decided weight of authority both in England and in this country is that rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole of the consideration," citing *Freeth v. Burr*, *supra*; *Mersey Steel & Iron Co. v. Naylor*, *supra*; *Simpson v. Crippin*, *supra*; *Newton v. Winchester*, 16 Gray (Mass.), 208; *Winchester v. Newton*, 2 Allen (Mass.), 492; *Sawyer v. Railway Co.*, 22 Wis. 403, 99 Am. Dec. 49; *Burge v. Railroad Co.*, 32 Iowa, 101; *Hayden v. Reynolds*, 54 Iowa, 157]. This case resembles *Mersey Steel & Iron Co. v. Naylor* very closely in its essential features. It was a contract for the delivery of ten carloads of barley in successive shipments, the sale being made on sample. When the first carload was sent the sellers drew on the buyers for the price and the draft was accepted, but when the car arrived the buyers found the barley not equal to sample; they therefore declined to pay the draft in full until other cars were received. The sellers refused to send any more, and brought suit for the price of the first carload. The buyers offered to recoup their damages for the non-delivery of the other nine carloads, and it was held that they were entitled to do so, as their refusal to pay for the first car under the circumstances was not absolute and did not justify rescission. This case is followed by *Hansen v. Consumers' Steam Heating Co.* (1887), 73 Iowa, 77, 34 N. W. R. 495; *Osgood v. Bauder*, 75 Iowa, 550, 1 L. R. A. 655, 39 N. W. R. 887. So

terial. "The right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party has refused upon full notice and demand to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, or on his belief that he is not violating the contract, but rests solely upon the fact whether or not he has violated or failed to perform a substantial part of the contract that the agreement required him to perform."¹

§ 1150. — Rule does not apply where contract clearly severable.— Where, however, the contract consists of several entirely distinct and independent parts, each of which can be performed without reference to the others, a failure of one of the parties to perform one of the terms is held not to authorize the other to rescind the whole contract and refuse to accept performance of the other terms by the party so in default, when such further performance is subsequently tendered.²

§ 1151. Alterations by consent in time or place of delivery.— Akin also to the subject discussed in preceding sections is that which arises where, at the request of one of the parties, and before the time for performance has expired, the time or place of delivery has been changed. Such changes may be so

also apparently does **Michigan**. See the late case of *West v. Bechtel* (1900), — Mich. —, 84 N. W. R. 69, where the cases are fully reviewed.

In a much cited note to the case of *Norrington v. Wright*, 21 Am. L. Reg. (N. S.) 395, when it was decided in the circuit court, Mr. Landreth collates the authorities English and American up to that date, 1882, and concludes that the weight of authority is to the effect that there can be no rescission unless the breach goes to the whole consideration. He also adds that "it is conceived that principle and the authorities will hardly

warrant the supreme court in sustaining the decision" of the lower court. But the supreme court *did* sustain the decision, and since Mr. Landreth's note was written several other decisions of the same sort have been made, as will be seen above.

¹ *Cresswell Ranch Co. v. Martindale* (1894), 63 Fed. R. 84, 11 C. C. A. 33, 27 U. S. App. 277.

² *Morgan v. McKee* (1874), 77 Pa. St. 228; *Herzog v. Purdy* (1897), 119 Cal. 99, 51 Pac. R. 27; *Myer v. Wheeler* (1884), 65 Iowa, 390, 21 N. W. R. 692 [cited in second note preceding].

great or made under such circumstances as to amount to an abandonment of the old contract and the making of a new one; in which case the new contract must be so made as to satisfy the requirements of the statute of frauds in all cases to which that statute is applicable.¹ Such alterations, however, do not usually result in the making of a new contract, but are rather to be construed as a forbearance or waiver, by the one party at the request of the other, of a strict performance of the contract according to its terms, but leaving the contract otherwise unimpaired and entitling either party at any time within the original period to insist upon its performance; while, on the other hand, a performance at the new time or place assented to is a performance of the original contract.²

¹ See *ante*, § 806.

² Thus in *Bacon v. Cobb*, 45 Ill. 47, where the defendants were sued for not delivering corn as they had agreed, it appeared that the plaintiffs, at the defendants' request, had several times extended the time and had changed the place of delivery. Still the corn was not delivered, and in the action to recover damages it was urged by the sellers that these changes amounted to a new contract and that the plaintiffs could not recover on the original one on which they had declared. But the court held that a recovery could be had, saying: "Numerous authorities might be cited to the point that, where a party agrees to accept the thing to be delivered at a time or place other than that stipulated, a performance of this by the other party is equivalent to a performance of the original undertaking. . . . It would be strange law, indeed, if the defendants were allowed to say that, inasmuch as you gave us further time in which to perform our contracts, and we did not comply, you have no right to an

action against us on our original contract." Citing *McCombs v. McKennan*, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505; *Cummings v. Arnold*, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; *Robinson v. Batchelder*, 4 N. H. 40; *Richardson v. Cooper*, 25 Me. 450.

In *McCombs v. McKennan*, *supra*, plaintiff was bound by contract under seal to deliver goods at a certain place, but afterwards, at his request, the defendant consented to receive the residue of the goods at a different place. Plaintiff delivered at the latter place, but defendant refused to receive, and the action was for damages on the original contract, and defendant insisted that it should have been on the new one; but the court said: "We think the true principle is that this was not so much an alteration of the original contract as a waiver or dispensation on the part of the defendant of certain things to be done by the plaintiff, which were conditions precedent to be performed by him. If a party agrees to accept the thing to be delivered at another time or place than that stipulated, a performance of this

§ 1152. —. It is indispensable, however, that the party seeking to enforce the contract upon a request for performance made after the expiration of the period originally fixed shall be the forbearing one, for otherwise he cannot show that he

by the other party is equivalent to a performance of the original undertaking. It imposes no new duty on the defendant; he simply accepts as performance by the plaintiff that which would not otherwise have been so; and the defendant's liabilities on the original contract remain the same."

In *Cuff v. Penn*, 1 Maule & Sel. 21, the seller at the buyer's request had consented to postpone the delivery of part of the goods, and it was held that this did not amount to a new contract but to a waiver of performance at the time stipulated in the old; and that the seller could insist on a delivery within a reasonable time thereafter. This case is relied upon and followed in *Watkins v. Hodges*, 6 H. & J. (Md.) 38.

In *Ogle v. Vane* (1867), L. R. 2 Q. B. 275, there were contracts for the delivery of iron by a certain time. Blackburn, J., said: "In the present case there were three contracts in writing, which may be treated as substantially one, that the five hundred tons of iron should be delivered by the end of July. None of it was delivered at that time; and the plaintiff, as he alleges, at the request of the defendant, waited till February, when he lost all patience and went into the market, and brought this action; and the damages were assessed at the market price in February, which was much higher than at the end of July. The argument of the defendant's counsel was that, inasmuch as the contract was broken at the end of

July, the damages were fixed at the time of the breach, and nothing could alter the amount of damages, except something which would constitute a new contract, and that this new contract, not being in writing, would be void under the statute of frauds. I do not think that is the proper view of the present case. There is no evidence to show that the defendant ever bound himself to wait for a later delivery, or that he ever made a fresh contract. . . . The plaintiff, instead of insisting on his strict rights, consented to treat the defendant leniently, and said, 'I'll wait, but I do not bind myself to wait.' . . . Here there was no substitution of one contract for another. The inference which I think the jury might well draw as the result of the evidence is that the parties did no more than this: The plaintiff was willing to wait, at the request of the defendant, for the defendant's convenience, and he did wait a long time, till February; but if he had lost patience sooner, and refused to wait any longer, he would have had a right to bring his action at once for the breach in July. It is clearly a case of voluntary waiting, and not of alteration in the contract."

In *Hickman v. Haynes* (1875), L. R. 10 C. P. 598, a contract was made by which the plaintiff agreed to sell and deliver, and the defendant to accept and pay for, one hundred tons of a certain kind of iron at a fixed price per ton, delivery to be made at the rate of twenty-five tons a month dur-

was ready and willing to perform at the time or place originally agreed upon; and he would be compelled to rely upon the consent of the other to a substituted performance, which consent would not be binding without consideration and the elements of a new contract.¹

ing four stated months. Seventy-five tons were delivered according to contract, but during the month in which the last instalment was to be made the defendants requested the plaintiff to defer delivery of the last twenty-five tons, and the plaintiff verbally assented. Later the plaintiff acquiesced in a further postponement, again at the defendant's request, but after waiting a reasonable time without result they brought suit. The defense was the statute of frauds. But the court held that there was no fresh agreement at all for the delivery of the twenty-five tons, which could be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendants of a delivery by the plaintiff of the last instalment of iron at the time originally agreed upon, and no binding agreement to enlarge the time for delivery.

In *Tyers v. Rosedale Iron Co.* (1875), L. R. 10 Exch. 195, there was a contract for the sale and delivery, in monthly instalments of one hundred and sixty-six and two-thirds tons, of two thousand tons of iron. At several times during the period of delivery the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during those months. In December, the last month for delivery under the terms of the contract, the plaintiffs de-

manded the delivery of the residue of the whole two thousand tons, which the defendants refused. The court of exchequer chamber, reversing the judgment of the court of exchequer, held that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities during certain months, and the defendants were therefore bound to deliver the whole two thousand tons under their contract.

¹ In *Plevins v. Downing*, 1 C. P. Div. 220, it appeared that on the 15th of June, 1874, the defendant bought of the plaintiffs one hundred tons of pig-iron, to be delivered, "twenty-five tons at once, and seventy-five tons in July next." By the end of July seventy-five tons in all had been delivered. There was no evidence of any request by the defendant to the plaintiffs before the end of July to delay the delivery of the last twenty-five tons; but it was proved that in October the defendant verbally requested the plaintiffs' manager to deliver them, in consequence of which they were forwarded in the course of the same month to the defendant, but he declined to receive them. In an action against the defendant for refusing to accept the twenty-five tons, the defendant pleaded, among other pleas, that the plaintiffs were not ready and willing to deliver the iron according to the contract. The court held that, inasmuch as the vendors were not shown to have

§ 1153. — **Resume of cases.**—The learned English editors of Benjamin on Sale summarize the results of the English cases, with which the American cases substantially agree, as follows:

“Where, in contracts for the delivery of goods by instalments, there have been applications for postponement, and a subsequent request for delivery by the buyer:—

“(A) Where the request is *within the contract time*.

“(1) The seller is bound to deliver, although there has been postponement at the buyer’s request.¹

“(2) It has not yet been decided whether the seller is bound to deliver all the quantities within the contract time, or only

withheld the delivery of the twenty-five tons in consequence of a request by the vendee before the expiration of the agreed time, viz., in July, the action was not maintainable upon the original contract; and that the subsequent conversation with the vendors’ manager could not be relied upon either as a new contract or as an arrangement for an altered time of delivery.

Brett, J., in delivering the opinion of the court, said: “It is true that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect in favor of either to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is, what is the test, in such an action as the present, whether the case is within the one rule or the other. Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time, in conse-

quence of a request to him to do so, made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages; . . . but if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do, so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman v. Haynes*.”

¹ Citing *Tyers v. Rosedale Iron Co.*, *supra*.

within some reasonable time afterwards, though the latter appears to be the better opinion.¹

“(B) Where the request is *after the contract time*.

“(1) If the postponement has taken place at the buyer’s request he is estopped from denying that the seller was ready and willing to deliver within the contract time.²

“(2) If the postponement has taken place at the seller’s request, he cannot maintain an action *on the original contract*, because he cannot prove he was ready and willing to deliver pursuant to the contract.”³

4. *The Thing to be Delivered.*

§ 1154. Article delivered must be the article agreed upon.

The article delivered or demanded under the contract must be the article which the parties respectively agreed to buy and sell. If they contracted in respect of a definite, ascertained and existing article, nothing but that identical article will satisfy the contract: the seller cannot deliver anything in its stead, nor can the buyer demand something else in place of it. The tender of something else, though equally valuable or useful, will not satisfy the seller’s duty. Neither can the buyer be compelled to take something else at a reduced price. This is too obvious to require extended discussion.⁴

¹ Citing *Tyers v. Rosedale Iron Co.*, *supra*.

² Citing *Ogle v. Earl Vane* and *Hickman v. Haynes*, *supra*.

³ Citing *Plevins v. Downing*, *supra*.

⁴ “When a person buys a particular thing, he cannot be compelled to take some other thing, even if like the thing he bought” (*Columbian Iron Works v. Douglas* (1896), 84 Md. 44, 34 Atl. R. 1118, 57 Am. St. R. 362), even though the thing tendered is of equal value or usefulness (*King v. Rochester* (1892), 67 N. H. 310, 39 Atl. R. 256); nor can he be compelled to take something else even at a re-

duced price. *National Water Pur. Co. v. New Orleans Water Works Co.* (1896), 48 La. Ann. 773, 19 S. R. 865.

An excellent illustration of this is found in the late case of *Webster-Gruber Marble Co. v. Dryden* (1894), 90 Iowa, 37, 57 N. W. R. 637. In this case a contract was made for the sale of a particular monument, selected and in stock, though the buyers at the time had not seen it. Upon examination they refused to receive it because of a flaw in one of the stones. The seller admitted the flaw, but proposed to get a new and perfect stone in its place. The buyers

§ 1155. — So, though the article is not definitely ascertained or is not in existence at the time of the contract, if the undertaking is that the thing sold, when ascertained or in existence, shall be of a certain kind, or possess certain qualities or characteristics, then it is equally obvious that nothing but

still refused to accept it. The seller sent for a perfect stone, lettered it, and offered to erect the whole monument as agreed upon, except for the substitution of this stone. The buyers refused to permit its erection, having bought another monument. *Held*, that the seller could not recover. Said the court: "A particular monument was purchased, of which complaint was afterwards made, and there was a refusal to accept it as it was, or with other stones, that would remove the flaws which were the grounds of objection. Plaintiff, with a view to enforce performance on the part of defendants, did the work and incurred the expense necessary to comply on its part. It, however, used other stones for the part of the monument above the base, and we are to say whether such a compliance will authorize recovery for the contract price. It is a case in which the parties are especially relying on their legal rights. We are satisfied that, before seeing the monument, defendants did not intend to take it if they could avoid it. We are also satisfied that plaintiff, while willing to make changes that would be of no detriment to it, would not do more, and insisted on every advantage the contract gave. Did the contract authorize the change made? We think not. It was not a purchase of a monument of a particular kind, but a purchase of a particular monument of a particular kind — one in stock, selected. If the stones

were imperfect there was no sale, for it is agreed that the intention was to sell a perfect monument. The sale of an imperfect monument for a perfect one would not be a sale of one that was perfect of the same kind. It was the sale of a particular article. If the monument was not imperfect, the plaintiff had the right to perform its contract and recover, but it must perform by delivering the particular thing purchased. If it was imperfect, then the order was obtained by misrepresentation, and conferred no rights upon plaintiff. So that, in either event, whether the change was made to avoid an unfounded complaint as to flaws or to remedy an actual defect, the result is the same. In the case of an actual defect it was the plaintiff's duty to treat the contract as of no force. In the other case it was its duty to disregard complaints and deliver the article sold, if it designed a legal enforcement of its rights. The contract provides that the defendants will not countermand the order. Appellant places much reliance on that particular provision, and refers to the case of *McAlister v. Safley*, 65 Iowa, 719, 23 N. W. R. 139. With our disposition of this case that one has no applicability. The holding there is that an unconditional contract for the delivery of a monument gives no right of rescission. Plaintiff's right of recovery is not denied on the ground of a rescission of the contract by defendants, but on the

an article of the kind or with the qualities or characteristics agreed upon can satisfy the contract; and again, the seller cannot be required to deliver something else, nor can the buyer be required to accept and pay for a thing different from that which he contracted to receive.¹

§ 1156. —. This requirement of conformity to description or sample is usually considered in American cases under the

ground of non-performance on its part."

A contract of sale provided that a tender of a bunch of cattle of a certain age should be made at a specified time. An offer of cattle older than those contracted for was made, and it appeared that they were probably more valuable. *Held*, that it did not satisfy the terms of the contract. *Vassau v. Campbell* (1900), 79 Minn. 167, 81 N. W. R. 829.

In *American Hoist & Derrick Co. v. Johnson* (1897), 114 Mich. 172, 72 N. W. R. 154, defendant ordered from plaintiff an engine mounted on a truck as illustrated in a certain cut in plaintiff's catalogue. The truck sent was higher than the one shown in the cut, and the wheels were different as to size, number of spokes and width of tires. *Held*, that a finding by the jury that the machinery sent was not substantially the same as that ordered would not be disturbed.

¹ This is the rule laid down in the case of *Pope v. Allis* (1885), 115 U. S. 363, 20 L. ed. 393, 6 Sup. Ct. R. 69, where Woods, J., says: "When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the

vendee under the contract; because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted," citing *Chanter v. Hopkins*, 4 M. & W. 399; *Barr v. Gibson*, 3 M. & W. 390; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Okell v. Smith*, 1 Stark. N. P. 107; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Boothby v. Scales*, 27 Wis. 626; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 346. See also *Filley v. Pope*, 115 U. S. 213, 29 L. ed. 372, 6 Sup. Ct. R. 19; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. R. 12; *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. R. 882; *Johnson v. Hibbard* (1896), 29 Oreg. 184, 44 Pac. R. 287; *Brewer v. Housatonic R. R. Co.*, 104 Mass. 593; *Bowes v. Shand*, 2 App. Cas. 455 (where Lord Cairns says that the plaintiff, who sues upon the contract, "has not launched his case until he has shown that he has tendered the thing which has been contracted for, and, if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract"); *Walker v. Davis* (1889), 65 N. H. 170, 18 Atl. R. 196; *Gregson v. Coal Co.* (1899), Tenn. Ch. App., (aff'd) 54 S. W. R. 113.

head of *warranty*, and in conformity to that practice will be treated under that head;¹ but it is obvious that, in many cases at least, it is something more than a warranty — something more than a collateral incident to the main contract — it *is* the contract, or, if a warranty at all, it is “a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.”²

§ 1157. Amount delivered must be the amount agreed upon.—Not only must the article delivered correspond in kind with that agreed upon, but it must also correspond in amount. Where a specific quantity or number is agreed upon, to be delivered at one time, that quantity or number must be delivered, and the seller will not perform his undertaking if he delivers either more or less. The buyer may, indeed, waive the discrepancy and agree to take the larger or the smaller quantity and thus become liable therefor, but he cannot be compelled to do so.³ Thus, going into detail —

§ 1158. — Tender of too much — Rejection — Selection. Where the seller delivers or tenders delivery of a greater quantity than was agreed upon, the buyer may refuse to receive it and reject the whole.⁴ He is not ordinarily obliged to select

¹ See *post*, §§ 1320, 1333.

² See per Gray, J., in *Norrington v. Wright*, *supra*. So in *Aultman v. Clifford*, 55 Minn. 159, 56 N. W. R. 593, it is said: “A delivery of property so as to pass the title to it, and make the transaction an executed contract, should be a delivery of property corresponding with the order or contract, which is a condition precedent to the vesting of the title in the vendee.” See also the full discussion in *Morse v. Moore*, 83 Me. 473, 23 Am. St. R. 783, 13 L. R. A. 224, 22 Atl. R. 362; *Jones v. George*, 61 Tex. 345, 48

Am. R. 280; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. R. 159; *Haase v. Nonnemacher*, 21 Minn. 486; *American Bronze Co. v. Gillette*, 88 Mich. 231, 26 Am. St. R. 286, 50 N. W. R. 136.

³ See following sections.

⁴ *Dixon v. Fletcher*, 3 Mees. & Wels. 146; *Hart v. Mills*, 15 Mees. & Wels. 85; *Cunliffe v. Harrison*, 6 Exch. 903; *Cleveland Rolling Mills Co. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. R. 882; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. R. 12; *Stevenson v. Burgin*, 49 Pa. St. 36; *Rommel v. Wingate*,

from the larger quantity that which will conform to the agreement, or to attempt to determine whether there is enough in a heterogeneous mass offered him to comply with his order.¹ This is always true where the selection or separation will impose upon the buyer trouble, expense or delay, though it is said that where the larger mass is all of the same kind and quality, and all that the buyer has to do is to take the quantity agreed upon, and this devolves no extra burden upon him, a tender of too much from which he may take the proper quantity is a good delivery.²

103 Mass. 327; *Bostock v. Jardine*, 3 Hurl. & Colt. 700, 11 Jur. (N. S.) 586; *Tamvaco v. Lucas*, 1 El. & El. 581, 102 Eng. Com. L. 581; *Bedell v. Kowalsky*, 99 Cal. 236, 33 Pac. R. 904; *Barton v. Kane* (1863), 17 Wis. 38; *Perry v. Iron Co.* (1888), 16 R. I. 318, 15 Atl. R. 87.

In *Whitla v. Moore* (1894), 164 Pa. St. 451, 30 Atl. R. 257, plaintiff sold defendant ten thousand dollars' worth of his stock of goods, and agreed to have the stock reduced to that amount by a certain day fixed upon for the transfer. On that day there appeared to be a large excess, but plaintiff offered to withdraw it or sell it to defendant on credit. Defendant declined and refused to complete the purchase. *Held*, that this was not such a default as would excuse performance by defendant.

Thus, in *Cunliffe v. Harrison*, 6 Exch. 903, there was an order for ten hogsheads of wine, but the seller sent fifteen. Parke, B., said: "The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him." So

a contract to deliver lumber of certain kinds is not performed by delivery of a mass of many kinds from which the buyer may select that which his contract calls for. *Hoffman v. King*, 58 Wis. 314, 17 N. W. R. 136. So where a lot of crockery was ordered and it was sent packed in a crate with a larger quantity, it was held not to be a good delivery, as it involved upon the buyer the burden of unpacking the crate and separating that designed for him from the residue. *Levy v. Green*, 1 El. & El. 969, 102 Eng. Com. L. 968, 28 Law Jour. R. (N. S.) 319, in the exchequer chamber. The lower court was equally divided. *Levy v. Green*, 8 El. & Bl. 575. So where coal of a certain kind is ordered, but coal of that and another kind is delivered in one pile, the buyer need not accept nor separate the ordered from the un-ordered kind. *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620. And on a sale of cotton of a given quality, the seller does not perform by a tender of a larger quantity out of which the buyer is required to select that which conforms to the contract. *Rylands v. Kreitman*, 19 Com. Bench (N. S.), 351, 115 Eng. Com. L. 349. To like effect: *Clark v. Baker* (1846), 11 Metc. (Mass.) 186.

² This is very strongly put in the

§ 1159. — **Excess not charged for.**—If, however, the larger quantity is supplied simply as a matter of abundant cau-

late case of *Brownfield v. Johnson* (1889), 128 Pa. St. 254, 18 Atl. R. 543, 6 L. R. A. 48, where plaintiffs, as defendants' agents, had purchased four hundred hectolitres of Brazil nuts, to be shipped from Brazil to New York. In order to get this quantity plaintiffs had to buy two lots at different prices, aggregating five hundred and eighty-two hectolitres. This quantity was put in one mass in the ship, but separate invoices were made, four hundred hectolitres being consigned to defendants, and the residue to other purchasers. On the arrival of the vessel at New York the defendants, whose duty it was in any event to measure and remove the nuts, went on board, but when they learned that the four hundred hectolitres were in the mass of five hundred and eighty-two hectolitres, they refused to receive any of them, Plaintiffs tendered to the defendants the whole five hundred and eighty-two hectolitres or four hundred hectolitres thereof, at their option, at the invoiced prices, which tender in either alternative the defendants refused to accept. Plaintiffs then tendered four hundred hectolitres at the average price, but this also defendants declined. Plaintiffs then separated four hundred hectolitres and notified defendants of the weight, but defendants absolutely declined to accept the nuts on any of the several propositions made by plaintiffs. Said the court, per Clark, J.: "If the purchase had been of four hundred hectolitres only, shipped in separate hold, there could be no question as to the defendants' liability for the price. What, then, was the

effect of placing the one hundred and eighty-two hectolitres in the same hold with the four hundred invoiced to the defendants? It may be conceded, as a general rule, that, as between vendor and vendee, when it is sought to compel a party to pay for goods which he has refused to accept, there can be no recovery unless the order has been strictly and literally fulfilled. The buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered. Benj. on Sales, § 1030. To the same effect are the cases cited by the plaintiffs in error. With reference to quantity, however, the rule is less rigid where goods are ordered from a correspondent who is agent for buying them (*Ireland v. Livingstone*, L. R. 2 Q. B. 99); for the relation of vendor and vendee, which finally results, is preceded by the relation of principal and agent, and the agent in such a transaction is necessarily invested with some degree of discretion in making the purchase. See also *Johnston v. Kershaw*, L. R. 2 Exch. 82, 36 L. J. Exch. 44, and *Jefferson v. Querner*, 30 L. T. (N. S.) 867. It must be conceded, however, that the purchase and tender of five hundred and eighty-two hectolitres upon an order for four hundred would involve a wider discretion than would be allowable under the special facts of this case, even as between principal and agent.

"In this case, however, the plaintiffs' correspondent purchased for and

tion, that there may be no doubt as to a full compliance and with no intention of charging for the excess, it will not vitiate the delivery.¹

invoiced to the defendants four hundred hectolitres only, and that quantity was tendered; the remaining one hundred and eighty-two hectolitres were not invoiced to the defendants, although the plaintiffs proposed that the defendants might have them if they chose to take them. The four hundred hectolitres of nuts unquestionably became the property of the defendants when purchased in Brazil, for they were purchased upon their order. By force of that order the plaintiffs became the defendants' agent with authority to constitute an agent in Para for its execution, and the nuts were bought in virtue of the authority thus conferred. The only question, therefore, would seem to be upon the effect of the shipping of the whole lot of five hundred and eighty-two hectolitres in one hold. It was shown that this was the usual method of shipping, especially when the orders were small. There was no effort to establish a custom of this kind, but simply to show that this was the usual and ordinary method pursued in the shipping trade. The defendant had a right to suppose these goods would be shipped in the usual manner, unless he directed otherwise, and that, although intermingled with others in the forward hold of the vessel for transportation, they would be separated at the place of

delivery. The nuts in question were of the same quality; they were bought at different prices, but the evidence is clear that they were of uniform quality. The weight of American authority supports the proposition that when property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. Oil in a tank and grain in an elevator may serve as illustrations of this rule. Where, however, the property is sold as part of a mass made up of units of unequal quality or value, such as cattle in a herd, selection is essential to the execution of the contract, and of course the rule cannot apply. *Benj. on Sales*, 477-531, and cases there cited. The storage of oil in tanks and of grain in elevators, although not universal, is the usual and ordinary means employed by large dealers in those commodities, and, whilst no custom of that kind, technically speaking, could be established, the usage of the trade and general course of business in this country is well known. In view of the necessities which grow out of such usage, the American courts have departed from the rule adhered to in England, and have recognized a rule for the delivery of this class of property more in conformity with the commercial usages of the

¹ *Downer v. Thompson* (1843), 6 Hill (N. Y.), 208; *Shrimpton v. Warmack*, 72 Miss. 208, 16 S. R. 494 (where it was held that a buyer of papers of needles, at so much per paper, each paper

to contain *two* needles, could not refuse acceptance because some papers contained *three*, no extra charge being made therefor).

§ 1160. — **Waiver of discrepancy.**—The buyer may, as has been stated, waive the discrepancy and keep the whole and become thereby liable to pay for it;¹ on the other hand, it is

country. A distinction is made between those cases where the act of separation is burdensome and expensive or involves selection, and those where the article is uniform in bulk and the act of separation throws no additional burden on the buyer. In the latter class of cases a tender of too much, from which the buyer is to take the proper quantity, is a good delivery. *Benj. on Sales*, 1030, note. See also *Kimberly v. Patchin*, 19 N. Y. 330; *Hutchison v. Commonwealth*, 82 Pa. St. 472; *Wilkinson v. Stewart*, 85 Pa. St. 255; *Bretz v. Diehl*, 117 Pa. St. 589.

"The case at bar bears no analogy whatever to *Stevenson v. Burgin*, 49 Pa. St. 36, for all that is decided by that case is 'that in a contract for a fixed quantity of merchandise to be delivered on board a vessel, the purchaser is not bound to accept *and pay* for a larger quantity.' The principle has no application to the evidence in this case. The case at bar bears a closer analogy to *Lockhart v. Bonsall*, 77 Pa. St. 53. In that case a tender of five thousand barrels of oil was made by *Lockhart* to *Bonsall* out of a bulk of five thousand nine hundred and eighty-one barrels contained in one hundred and eighteen bulk cars. As it was the duty of *Bonsall* to pump the oil from the cars into the tanks of the *Anchor Works*, which had been designated as the place of delivery, it was held that *Lockhart* was not bound to set apart the precise quantity named in the contract before offering to deliver. So here, the measuring of the nuts and their removal from the ves-

sel was the work of the defendants, and as the article was uniform in bulk, selection was of no consequence; nor was the act in any sense burdensome or expensive, for, assuming that the whole bulk was to be measured, yet the expense attached to the whole, and each part owner was liable to share it.

"We are of opinion that when the nuts were delivered on board the *Portuense* at *Para*, the title to 400-482 of the bulk belonged to the defendants, and that upon the arrival of the vessel at New York the tender of the five hundred and eighty-two hectolitres from which the defendants were invited to take their share was a good delivery."

See also *Martz v. Putnam* (1888), 117 Ind. 392; *Iron Cliffs Co. v. Buhl* (1879), 42 Mich. 86.

¹ See *Avery v. Wilson*, 81 N. Y. 341, 37 Am. R. 503; *Churchill v. Holton*, 38 Minn. 519, 38 N. W. R. 611; *Cunliffe v. Harrison*, 6 Exch. 903. Whether he has waived the excess is usually a question of fact for the jury.

In *Larkin v. Mitchell Lumber Co.*, 42 Mich. 296, 3 N. W. R. 904, defendant ordered a quantity of shingles. Plaintiff, the seller, largely exceeded the order in shipment. The defendant received the whole quantity, paid the freight, notified seller of excess, and held the excess subject to seller's order. The shingles were immediately afterwards destroyed by fire without the fault of the consignee. *Held*, that buyer was not liable for value of the excess and could recover what he had advanced as freight upon it.

held that if he keeps a part only he may reject the residue, becoming liable on a new contract for the part retained.¹

§ 1161. — Tender of too little — Rejection — Acquiescence.— So, if the seller delivers or offers to deliver a less quantity than that which was agreed upon, the buyer may refuse to accept it. He may insist upon having all or none.² This much is clear; but supposing that the seller does deliver and the buyer receives a part only, what is then the duty and the

¹ In *Hart v. Mills* (1846), 15 Mees. & Wels. 85, the defendant had ordered two dozens of each of two kinds of wine. The plaintiff sent four dozens of each. The defendant returned the four dozens of one kind less one bottle which he tasted; he also returned three dozens of the other kind; and he wrote to the plaintiff saying that he would not have been particular about keeping the four dozens instead of two if the quality had suited him. The plaintiff sued for the whole amount; defendant paid into court £4 on account of that kept; the jury found for the plaintiff £1 3s. beyond the sum paid into court; leave was reserved to move for £4 more, on the ground that defendant was liable at least for two dozens of each kind. *Held*, in the court of exchequer, that they could not recover. The case was disposed of thus: Counsel for plaintiff: "This was an entire contract, which was fulfilled by delivery, and the defendant could not repudiate it as to part. He does not absolutely reject it." Alderson, B.: "How do you get over the difficulty that you have not complied with *your* contract? The defendant orders two dozens of each wine, and you send four; then he had a right to send back all; he sends back part; what is it but a new contract as to the part

he keeps? If you had sent only two dozens of each wine, you would be right; but what right have you to make him select any two dozens from the four?" Counsel for plaintiff: "He affirms the contract as to the whole by the letter." Alderson, B.: "No; that is the new contract. The jury ought in truth to have found a verdict for the defendant, for the money paid into court covered the whole demand for which the defendant was liable. At present you have been paid £4 for thirteen bottles of wine." See also *Cohen v. Pemberton* (1885), 53 Conn. 221, 2 Atl. R. 315.

² *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. R. 12; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. R. 882; *Crowl v. Goodenberger* (1897), 112 Mich. 683, 71 N. W. R. 485; *Rockford, etc. R. Co. v. Lent*, 63 Ill. 288; *Smith v. Lewis*, 40 Ind. 98; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. R. 701; *Avery v. Wilson*, 81 N. Y. 341, 37 Am. R. 503; *Churchill v. Holton*, 38 Minn. 519, 38 N. W. R. 611; *Bruce v. Pearson* (1808), 3 Johns. 534; *Reuter v. Sala*, L. R. 4 C. P. Div. 239; *Dixon v. Fletcher*, 3 Mees. & Wels. 146; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; *Oxendale v. Wetherell*, 9 B. & C. 386; *Waddington v. Oliver*, 5 Bos. & Pul. (2 Bos. & Pul. N. R.) 61.

obligation of the buyer? The answer to this question must depend largely upon the circumstances of each case. If the buyer is led to receive part, relying upon the seller's duty or promise to make good the deficiency, and this is not done, the buyer, having done nothing to estop himself, may then reject the part performance.¹ If the seller delivers but part of the goods, and the buyer acquiesces in this and accepts and promises to pay for the part so delivered, the buyer will be deemed to have waived full performance and may be held liable to pay for the part received.² In such a case he would not be entitled to damages for the non-delivery of the residue, unless his acceptance of the part delivered was conditioned upon such right.

§ 1162. — Retention of part delivered — Implied promise to pay therefor.— But if there be a part delivery which the buyer retains without any other acquiescence or waiver or

¹ See *Polhemus v. Heiman*, 45 Cal. 573; *Bowker v. Hoyt*, 18 Pick. (Mass.) 555; *Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. R. 475; *Oxendale v. Wetherell*, 9 B. & C. 386.

² Thus in *Avery v. Wilson* (1880), 81 N. Y. 341, 37 Am. R. 503, where the contract was for the delivery at one time and in one lot of a quantity of glass, and a part of it only was delivered, it was said: "While the defendants were not bound to accept a delivery of a portion of the boxes of glass, and had a right to reject or retain the same as they saw fit, yet if they elected to receive the part delivered, appropriated the same to their own use, and by their acts evinced that they waived this condition, they became liable to pay for what was actually delivered. This rule is established in numerous reported cases, and the question of waiver is frequently one of fact to be determined by the circumstances and the evidence. *Vanderbilt v. Eagle Iron*

Works, 25 Wend. (N. Y.) 665; *Corning v. Colt*, 5 Wend. 253; *Krom v. Levy*, 3 N. Y. Sup. 704, 6 id. 253; *Flanagan v. Demarest*, 3 Robt. 173; *Normington v. Cook*, 2 N. Y. Sup. 423; *Welch v. Moffatt*, 1 id. 575." The court distinguish the cases of this kind, where there is a failure to deliver the whole of a single lot agreed upon, and the cases, hereafter to be considered, of a failure to deliver part of a number of quantities to be delivered at successive intervals. (To same effect: *Dalzell v. Fahys Watch Co.*, 138 N. Y. 285, 33 N. E. R. 1071; *Brady v. Cassidy*, 145 N. Y. 171, 39 N. E. R. 814.) See also, that the discrepancy may be waived, expressly or by conduct, in which case the buyer must pay for the part so accepted, *Churchill v. Holton*, 38 Minn. 519, 38 N. W. R. 611; *Marland v. Stanwood*, 101 Mass. 470; *Morgan v. Gath* (1865), 3 H. & C. 748; *Defenbaugh v. Weaver* (1877), 87 Ill. 132; *Downs v. Marsh* (1860), 29 Conn. 409.

promise to pay than might be inferred from the mere retention, may the seller then recover for the part so retained? It is held in many of the American cases that he cannot. The contract being entire, and the delivery of the whole being a condition precedent to the buyer's duty to pay, the seller can maintain no action on the contract which he himself has failed to perform, and the law will not imply a new contract to relieve him from the consequences of his own default.¹ Other cases, however, proceeding upon the principles laid down in the great case of *Britton v. Turner*,² hold that the buyer's voluntary retention of the part delivered raises an implied promise to pay, not necessarily the contract price, but the reasonable value of the part so delivered after deducting the damages which the buyer has sustained by reason of not receiving the entire amount. Reason and the weight of authority unite in sustaining this rule.³

§ 1163. — Severable contract — Recovery for part performance.— Where, however, the contract is not entire but severable, other considerations apply. In determining whether

¹ *Champlin v. Rowley*, 13 Wend. (N. Y.) 258; s. c., 18 id. 187; *Mead v. Degolyer*, 16 Wend. 632; *Baker v. Higgins*, 21 N. Y. 397; *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183; *Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. R. 475; *Kein v. Tupper*, 52 N. Y. 550 [but see *Avery v. Wilson*, 81 N. Y. 341, 37 Am. R. 503]; *Witherow v. Witherow*, 16 Ohio, 238; *Haslack v. Mayers*, 26 N. J. L. 284.

² 6 N. H. 481, 26 Am. Dec. 713; *Mechem's Cases on Damages*. As a matter of pleading, *Holden Steam Mill v. Westervelt*, 67 Me. 446, holds more strongly for assent by the buyer to the part delivery than many of the cases in the following note.

³ In *Bowker v. Hoyt*, 18 Pick. (Mass.) 555, it was held that if the vendee of a specific quantity of goods sold

under an entire contract receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and he becomes liable to the vendor for the price of such part; but he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfill his contract. To the same effect: *Richards v. Shaw*, 67 Ill. 222; *Clark v. Moore*, 3 Mich. 55; *Shaw v. Badger*, 12 Serg. & R. (Pa.) 275; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. R. 276; *Rodman v. Guilford*, 112 Mass. 405; *Flanders v. Putney* (1878), 58 N. H. 358; *Harralson v. Stein* (1873), 50 Ala. 347; *Oxendale v. Wetherell*, 9 B. & C. 386; *Shipton v. Casson*, 5 B. & C. 378; *Bragg v. Cole*, 6 J. B. Moore, 114.

it is severable or entire, the rule laid down by Mr. Parsons¹ has been frequently approved by the courts: "If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. . . . But if the consideration to be paid is single and entire the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." If, under this rule, the contract is severable, the seller may recover in any event for the part delivered, leaving the other to his remedy by recoupment or action for the damages sustained by non-delivery of the residue.²

§ 1164. — The rule stated by Mr. Parsons is simply a recognition of the fact that there may be contracts in which, "although the agreement is entire, the performance is severable," or, as it has been otherwise expressed, that there may be a contract which may be "one and entire in its origin, and yet, looking to the performance of different things at different times, it may be divisible in its operation."³

§ 1165. — **Severable contract — Failure as to part.**— Attention has been given in a preceding section⁴ to the effect of a breach in the performance of one of the instalments of an entire contract. Where, however, the contract is clearly severable, consisting of several entirely distinct and independent parts, it is held that the failure of one party to perform one part does not justify the other in refusing to accept performance of the residue;⁵ nor does the failure of the buyer to re-

¹Parsons on Contracts, vol. II, (1897), 119 Cal. 99, 51 Pac. R. 27; pp. *517-520 (pp. 648-651 of 7th ed.). Ritchie v. Atkinson, 10 East, 295.

²Lucesco Oil Co. v. Brewer, 66 Pa. St. 351; Rugg v. Moore, 110 Pa. St. 236, 1 Atl. R. 320; Gill v. Lumber Co., 151 Pa. St. 534, 25 Atl. R. 120; Morgan v. McKee (1874), 77 Pa. St. 228; Gomer v. McPhee, 2 Colo. App. 287, 31 Pac. R. 119; Herzog v. Purdy

³See Barrie v. Earle, 143 Mass. 1, 58 Am. R. 126, 8 N. E. R. 639.

⁴See *ante*, § 1140 *et seq.*

⁵Morgan v. McKee (1874), 77 Pa. St. 228; Morris v. Wibaux (1895), 159 Ill. 627, 43 N. E. R. 837.

ceive a part relieve the seller of his duty to tender performance of the residue when such performance is due.¹

§ 1166. — **Quantity indefinite — “More or less” — “About.”** — Precision as to the quantity may be sought to be avoided by the use of qualifying limiting expressions, such as *say, about, say about, more or less*, and the like. The effect of such expressions must depend largely upon the circumstances of each case. In a leading case in the supreme court of the United States² the following rules were laid down as an aid in the determination of the question:

§ 1167. — 1. Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of “about,” or “more or less,” or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.³

¹ Herzog v. Purdy (1897), 119 Cal. 99, 51 Pac. R. 27.

² Brawley v. United States (1877), 96 U. S. 168, 24 L. ed. 622.

³ Where the contract was for the transportation of certain goods “supposed to amount to about three thousand seven hundred barrels,” it was held that the contract was performed though it proved that there were but three thousand one hundred and five barrels. Robinson v. Noble, 8 Pet. (U. S.) 181. A contract for the sale of an agreed pile of old iron estimated at “about one hundred and fifty tons” is satisfied by the delivery of that pile, though on

weighing it proves to contain but forty-four tons. McLay v. Perry, 41 L. T. (N. S.) 152. So where the contract was for the sale of a definite pile of guano, “estimated to be two hundred and fifty-three and one-third tons, more or less,” at a fixed price per ton, and the contract stipulated that the excess, if any, should be paid for at that price, or the deficiency, if any, allowed for at that price, it was held that the buyer was bound to pay the contract price for the whole pile though it appeared on weighing to contain seven hundred and two and seven-tenths tons, no fraud appearing. Navassa Guano

§ 1168. — 2. When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words, "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.¹

Co. v. Commercial Guano Co., 93 Ga. 92, 18 S. E. R. 1000 (relying upon *Brawley v. United States, supra*). See also *Morris v. Wibaux* (1892), 47 Ill. App. 630; *Day v. Cross* (1883), 59 Tex. 595; *McConnel v. Murphy* (1873), L. R. 5 P. C. 203.

¹ Thus in *Cross v. Eglin*, 2 B. & Ad. 106, 22 Eng. Com. L. 53, where it did not appear that the parties intended the whole cargo of the ship, by an agreement to take "about three hundred quarters, more or less," of grain shipped on a certain ship, it was held that the buyers were not obliged to take three hundred and fifty quarters which came in the ship.

So where one contract provided for cutting and delivering "about five hundred thousand feet of pine logs," and another "about one million feet more or less of pine saw logs," a charge that the addition of the qualifying words "about" and "more or less" was only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies, was held proper, the court saying: "Indeed, it is well settled that, when a specified quantity of an article or thing bought or sold is mentioned in a contract, the amount named will always be regarded as material and determinative, notwithstanding the use of the qualifying phrase 'more or less,' except in those cases where it is appar-

ent or fairly inferable from other parts of the agreement that a particular lot of goods was intended to be sold." U. S. v. *Pine River L. & I. Co.*, 61 U. S. App. 80. See also *N. E. etc. Co. v. Standard*, 165 Mass. 332; *Kerwan v. Van Camp Co.*, 12 Ind. App. 6.

In *Leeming v. Snaith*, 16 Q. B. 275 (71 Eng. Com. L.), a contract to deliver goods, "say not less than one hundred packs," was held to require delivery of at least that quantity. See *Low v. Freeman* (1850), 12 Ill. 467; *Tilden v. Rosenthal* (1866), 41 Ill. 386; *Reuter v. Sala* (1879), 4 C.P.D. 239, C. A.

In *Holland v. Rea*, 48 Mich. 218, 12 N. W. R. 167, it is held that a contract for the sale of five hundred thousand feet of lumber, "more or less," is not void for indefiniteness, and is satisfied by the delivery of four hundred and seventy-three thousand feet. The court said it was evident that the agreement in regard to quantity should not fix the precise amount; that the intent was that the sellers should be allowed to deviate somewhat from the quantity named, and that the buyers should be bound to take whatever quantity should be furnished within the limits to which the deviation might properly extend, and that "the deviation was quite within the degree the courts have held to be reasonable," citing *Cabot v. Winsor*, 1 Allen (Mass.), 546; *Morris v. Levison*, 1 C.

§ 1169. — 3. If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or more extensive significance, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the quantity is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. So where a manufacturer contracts to deliver at a certain price all the articles he shall make in his factory for the space of two years, "say a thousand to twelve hundred gallons of naphtha per month," the designation of quantity is qualified not only by the indeterminate word "say," but by the fair discretion or ability of the manufacturer, always provided he acts in good faith.¹

P. Div. 155; McConnel v. Murphy, L. R. 5 P. C. 203.

So in *Polhemus v. Heiman*, 45 Cal. 573, where the contract was for the sale of *about* fifty-three thousand pounds of wool, the court said: "It did not call for the delivery of the exact number of pounds specified. The vendors reserved to themselves a certain reasonable latitude in performance."

The words "more or less" do not create an ambiguity which parol evidence may be used to explain. *Shickle v. Chouteau*, 10 Mo. App. 241.

In *Cabot v. Winsor* (1861), 1 Allen, 546, it was held that the words "more or less" in a broker's note for the sale of goods, as follows: "Sold to Winsor & Co., for account of Stephen Cabot, five hundred bundles, more or less, gunny bags," do not create a latent ambiguity, or authorize the

introduction of parol evidence by the purchaser to show an understanding between the parties that he was to have either more or less than the number specified, as might reasonably be found necessary to fill a ship; although it appeared that both parties knew at the time of the purchase that the goods were bought for the purpose of filling a ship, and that it was uncertain what number would be necessary. Under such a contract there is substantial compliance although there is a deficiency of five per cent. Where the facts are not in dispute the question of substantial compliance is for the court.

¹ This was the decision in *Gwillim v. Daniell*, 2 Crompt. M. & R. 61, where Lord Abinger says: "The agreement is simply this: that the plaintiff undertakes to accept all the naphtha that the defendant may

§ 1170. — Quantity indefinite — Option as to quantity — Election.—The precise amount to be furnished may also be left to be determined by one of the parties, and his determination, when made and manifested, fixes the quantity to which the contract applies. It may thus be at the option of either to deliver or demand “up to” a certain quantity, or “from” one quantity “to” another, or “between” one quantity and another. In the former case, while there is a maximum there is no minimum limit; in the two latter cases the extremes are

happen to manufacture within the period of two years. The words, ‘say from one thousand to twelve hundred gallons per month,’ are not shown to mean that the defendant undertook, at all events, that the quantity manufactured should amount to so much. If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here it does not appear that, in the ordinary course of his manufacture, the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract.” So in *Tancred v. Steel Co.* (1890), 15 App. Cas. 125, the contract was that the sellers should supply “the whole steel” for the Forth bridge. The contract also contained this clause: “The estimated quantity of steel we understand to be thirty thousand tons, more or less;” and it was held that the sellers had the right to supply the whole of the steel required for the bridge, and that this right was not qualified by the statement referred to. And in *Brawley v. United States*, *supra*, where the contract was with the United States government to take eight hundred and eighty cords of wood, “more or less, as shall be determined to be

necessary, by the post commander, for the regular supply, in accordance with army regulations, of the troops and employees” of a certain garrison for a certain year, and the post commander determined that forty cords were all that were required and so notified the seller before more than that quantity had been delivered, it was held that the government was not liable for more than the forty cords. To the same effect is *Lobenstein v. United States*, 91 U. S. 324.

So an agreement to sell a cargo of iron to be shipped by a certain ship, “about three hundred or three hundred and fifty tons,” is complied with by a delivery of all that vessel can carry, though it be only two hundred and twenty-seven tons. *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.), 589. To similar effect: *Bourne v. Seymour*, 16 Com. B. 337. Where the contract was for the sale of “all the spars manufactured by A., say about six hundred, averaging sixteen inches,” it was held that a tender of four hundred and ninety-six, which were all that averaged that size, was a compliance. *McConnel v. Murphy*, L. R. 5 P. C. 203. See also *Harrington v. Mayor*, 10 Hun (N. Y.), 248, affirmed, 70 N. Y. 604; *Callmeyer v. Mayor*, 83 N. Y. 116; *Thurber v. Ryan* (1874), 12 Kan. 453.

limited, but the precise quantity may be anything included in or between the limits fixed.¹

§ 1171. — The contract may expressly determine which party is entitled to exercise the option and determine the quantity; but, in the absence of express agreement, it must be determined from the nature of the case, and in this respect the rule laid down by the authorities is that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice in order that he may be able to do that first act, and, when once he has done that act, the election has been irrevocably determined, but till then he may change his mind.²

5. *To Whom Delivery is to be Made.*

§ 1172. **Must be to buyer or some one who represents him for that purpose.**— Such delivery of the goods as the law requires under the circumstances,— whether it be the active and

¹ Where the agreement was for the sale of “from one to three thousand bushels of potatoes,” to be delivered at a certain place, it was held that the seller had the right to deliver any quantity he chose within the limits fixed, and that he was not bound to make his election till they arrived at the place of delivery, though requested by the other party after the shipment was made. *Small v. Quincy* (1827), 4 Me. 497. And where the contract was for the sale of “from seven hundred to one thousand barrels” of meal by the first day of May, and the seller, before that date, delivered seven hundred barrels, and also before that date tendered three hundred barrels more, which the buyer refused to receive, it was held that the buyer was bound to take and pay for the one thousand

barrels; that the delivery of any quantity from seven hundred to one thousand barrels was at the seller's option and for his benefit. *Disborough v. Neilson* (1802), 3 Johns. Cas. (N. Y.) 81.

² Benjamin, Sales (6th Am. ed.), 359; Blackburn, Sales, p. 128; Co-myn's Dig., Election. In *White v. Toncray* (1838), 9 Leigh (Va.), 347, it was held that a contract between a carrier and a salt manufacturer, whereby the carrier agreed to transport from one thousand two hundred to five thousand barrels of salt annually, gave the manufacturer and not the carrier the right to elect what quantity, not less than one thousand two hundred nor more than five thousand barrels, should be transported by the carrier annually.

actual transportation and surrender of them by the seller, or his passive act in putting them at the disposal of the buyer — must be made to the buyer or to some one who represents him for that purpose. There can clearly be no performance by the seller if he deliver the goods to a person not authorized to receive them for the buyer.

§ 1173. Delivery to agent sufficient.— Without going into the question of what constitutes authority to receive delivery — a subject belonging to the law of agency,— it is of course true that a proper delivery to an authorized agent of the buyer will be a good performance.¹

§ 1174. Delivery to one of joint purchasers sufficient.— Where goods are sold to two or more, a delivery to any one of them will satisfy the seller's duty to deliver.²

§ 1175. Delivery to carrier, when sufficient.— The question of the sufficiency and effect of a delivery of the goods to a carrier has been already considered for several purposes, the most important of which is the effect of such a delivery as an appropriation of the goods to a contract which before that time had reference to *some* goods, but not to *any particular* ones.³ The question here involved is the question of the delivery to a carrier of specific goods which have, before that time, been definitely agreed upon by the parties. The general principles governing it are, in the main, substantially the same as those controlling in the former case, though the two cases are not identical. The important question there was, when does the title pass; the question here is, even though the title has passed, when has the seller performed his undertaking to deliver. Even here, however, the contract may take such a form that delivery of specific goods is a condition precedent to the passing of the title.

¹ Bonner v. Marsh, 10 Sm. & M. (Miss.) 376, 48 Am. Dec. 754.

² Adler v. Wagner, 47 Mo. App. 25.

³ See *ante*, § 736.

§ 1176. — **How question arises.**— Inasmuch as the difference in the questions here involved seems often to be lost sight of, if not utterly lost in confusion, it is proposed, at the risk of being tedious, to illustrate the various forms which they may take:

1. A says or writes to B, "Send to me," "furnish me with," "supply me with" goods of a certain kind. No specific goods are mentioned or intended. No title passes until B accepts the order and appropriates some certain goods to it. What constitutes such an appropriation has been already considered.

2. A, who has previously seen or examined or negotiated concerning *certain* goods offered for sale by B, says or writes to B, "Send to me," or "furnish," or "supply me with" "*the* goods I examined," or "designated," and the like. Here is an offer for *specific* goods, and no *appropriation* in that sense is necessary.

3. A says to B concerning specific goods which B offers to sell to him: "I will take those goods." The title at once passes.

4. A says to B concerning specific goods which B offers to sell to him: "I will take those goods *and* you shall deliver them" at some particular place or in some particular time or manner. B assents. The title passes and B *agrees* to deliver the goods in accordance with the stipulation.

5. A says to B concerning specific goods which B offers for sale: "I will take the goods *if* (or *when*, or *upon condition that*, or *provided that*) you deliver them" at a particular time or place or in a particular manner; or "Send the goods to me and I will take them." B assents and agrees to so deliver them. Title does not pass until the condition is complied with.

It is evident that form 2 may, under varying circumstances, be either form 3, 4 or 5. Case 4 may also, under certain circumstances, be found to be case 5, as where the matter of delivery, though couched in the form of a mere subordinate agreement, is found to have been really a condition precedent.

§ 1177. — **How question determined.**— The determination of these questions may be facilitated by a recurrence to

some principles already considered. In the first place, it is the general rule, as has been seen,¹ that, in the absence of anything to show a contrary intention, the goods are to be delivered at the place where they are at the time of the sale. *Prima facie* then in case 3, and under some forms of case 2, the goods are to be delivered where they are at the time of the sale, and if they need transportation the buyer must provide it. If, in addition to the sale, there is a concurrent *agreement* that the seller shall deliver, at a particular place or time or manner, the title passes,² and the seller in making the delivery must act as the agent or bailee of the buyer, and if he fails to deliver, or delivers negligently, his liability must be based not upon his failure to sell but upon his neglect or failure to deliver, and will be governed by the same principles which would govern such neglect or failure on the part of any bailee or agent.³ This is case 4. Again, as in case 5, it may be the express condition that there shall be a sale only upon condition that the seller does deliver the goods in a particular time or manner or at a specified place. Here the title will not pass until this condition is complied with. If not complied with, the buyer may have an action for damages against the seller, but it will be as for the breach of an executory agreement. Finally, upon the principle that stipulations respecting time, place, etc., in the contracts of merchants are in the nature of conditions precedent,⁴ it may be found in certain cases that what in form is case 4 is really case 5 in legal effect.

§ 1178. — Is matter of agreement — Construction of agreement.—The obligation of the seller to carry or send the goods to the buyer in the case of the sale of specific goods rests, therefore, upon his agreement so to do. That agreement may, of course, be express, or it may be implied from the situation or nature of the goods, the previous dealings of the par-

¹ See *ante*, § 1124.

tle Falls Lumber Co., 47 Minn. 422,

² This is well illustrated in *Terry* 50 N. W. R. 471.

v. Wheeler, 25 N. Y. 520; *Rail v. Lit-*

³ *Taylor v. Cole*, 111 Mass. 363.

⁴ See *post*, § 1206 *et seq.*

ties, the custom in like cases, or the other circumstances surrounding the transaction.

§ 1179. —. It must be kept in mind, also, that the parties are, in general, at liberty to make whatever contract pleases them respecting the time or place or risks of delivery. As was pointed out by Lord Blackburn in a case¹ already referred to,³ if the language of the parties indicates that they intend that the goods, when delivered to the carrier, shall be at the buyer's risk, that intention is effectual; if it shows that they intend that the seller shall not merely deliver the goods to the carrier, but shall also undertake that they shall actually be delivered at their destination, that intention also is effectual; and if it shows, still further, an intention that, when the goods are delivered to the carrier, the seller shall have performed his undertaking, but still that the goods are not to be paid for unless and until they arrive at their destination, this intention will be given effect, and, though the title has passed and the goods have been delivered, the price will not be payable unless they actually arrive.

§ 1180. —. And even though an order for goods is given under circumstances which would otherwise indicate that delivery to a carrier would be a performance, it may still be shown to have been the real contract of the parties that the seller should deliver the goods at the buyer's place of business.³ So, though the contract in terms stipulates that the goods are to be delivered by the seller at a certain place, it may appear to be the true construction of the contract that this meant simply that the seller should pay the cost of transportation, and that therefore a delivery to the carrier and the payment of the freight constituted a performance of the contract.⁴

¹ *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322.

² See *ante*, § 742.

³ *McLaughlin v. Marston*, 78 Wis. 670, 47 N. W. R. 1058.

⁴ Such was the case of *Tregelles v. Sewell*, 7 Hurl. & Nor. 574. So also *Neimeyer Lumber Co. v. Burlington, etc. R. Co.* (1898), 54 Neb. 321, 74 N. W. R. 670, 40 L. R. A. 534.

In every case, therefore, the question is, What did the parties intend and agree?

§ 1181. Undertaking of seller to “send,” “ship” or “forward” goods, how satisfied.—It is obvious that the agreement of the seller or the direction of the buyer to *send* the goods to the latter may have a variety of meanings, including even an actual transportation and delivery by the seller to the buyer at the point of destination as a condition precedent to the passing of the title. In the ordinary case, however, where specific goods are sold at one place which the buyer desires to have delivered at another, and the seller expressly or impliedly agrees, or the buyer directs him, to *send* them to that place, without specifying the means or method, this agreement or direction is satisfied when the seller has delivered the goods to a common carrier consigned to the buyer at the place specified.¹ The same construction must also be given to an agreement or a direction to *ship* or *forward* the goods.² *A fortiori* will these

¹See *ante*, § 1178; *Dawes v. Peck*, 8 T. R. 330; *Waite v. Baker*, 2 Ex. 1; *Fragano v. Long*, 4 Barn. & Cr. 219; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Johnson v. Dodgson*, 2 Mees. & Wels. 653; *Norman v. Phillips*, 14 id. 277; *Meredith v. Meigh*, 2 El. & Bl. 364; *Cusack v. Robinson*, 1 Best & S. 299; *Hart v. Bush*, El. Bl. & El. 494; *Smith v. Hudson*, 34 L. J. Q. B. 145; *Dutton v. Solomonson* (1803), 3 Bos. & Pul. 582; *Ex parte Pearson* (1868), L. R. 3 Ch. App. 442; *Taylor v. Victoria Co-operative Store Co.* (1894), 26 Nova Sco. 223; *Stafford v. Walter*, 67 Ill. 83; *Pike v. Baker* (1870), 53 Ill. 163; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Krulder v. Elison* (1871), 47 N. Y. 36; *Sarbecker v. State*, 65 Wis. 171, 26 N. W. R. 541; *Kelsea v. Ramsey Mfg. Co.*, 55 N. J. L. 320, 22 L. R. A. 415, 26 Atl. R. 907; *Colcord v. Dry-*

fus, 1 Okla. 228, 32 Pac. R. 329; *West v. Humphrey*, 21 Nev. 80, 25 Pac. R. 446; *Kessler v. Smith*, 42 Minn. 494, 44 N. W. R. 794; *Osborne v. Van Atten*, 3 Wash. Ter. 53, 13 Pac. R. 242; *Hope Lumber Co. v. Foster Hardware Co.*, 53 Ark. 196, 13 S. W. R. 731; *Rechten v. McGary*, 117 Ind. 132, 19 N. E. R. 731; *Falvey v. Richmond*, 87 Ga. 99, 13 S. E. R. 261; *Mann v. Glauber*, 96 Ga. 795, 22 S. E. R. 405; *Bacharach v. Chester Frt. Line*, 133 Pa. St. 414, 19 Atl. R. 409; *Perlman v. Sartorius*, 162 Pa. St. 320, 42 Am. St. R. 834, 29 Atl. R. 852; *The Mary and Susan* (1816), 1 Wheat. (U. S.) 25; *Price v. Boston, etc. R. Co.* (1869), 101 Mass. 542; *McKee v. Bainter* (1897), 52 Neb. 604, 72 N. W. R. 1044.

²*Phoenix Lock Co. v. Hardware Co.* (1891), 9 Houst. (Del.) 232, 32 Atl. R. 79.

conclusions follow if the buyer directs that the goods be sent or shipped by a particular carrier.¹

§ 1182. — **Selection of the carrier.**—In these cases the carrier is to be deemed the bailee or agent of the buyer, and the seller in selecting the carrier, where none is named, acts also as the buyer's agent.² In making the selection of the carrier, in the latter case, the seller must be governed by the circumstances of the case. If there be but one carrier, delivery to him will be deemed to have been intended; if there be more than one, then the seller will have performed his duty if he sends the goods in the usual and customary way.³ But if the carrier be designated by the buyer, a delivery to another than the one specified will not be a performance of the seller's undertaking.⁴ He should deliver to the one named, or, if that is impossible, notify the buyer and await further instructions.

§ 1183. — **Delivery to the carrier must be made with due care.**—In order that the delivery to the carrier shall be deemed a delivery to the buyer so as to charge him with the responsibility of the goods and relieve the seller, it is further

¹ *State v. Peters* (1897), 91 Me. 31, 39 Atl. R. 342; *Mann v. Glauber* (1895), 96 Ga. 795, 22 S. E. R. 405; *Hobart v. Littlefield*, 13 R. I. 341; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Ma-gruder v. Gage*, 33 Md. 344, 3 Am. R. 177; *Whiting v. Farrand*, 1 Conn. 60; *Janney v. Sleeper*, 30 Minn. 473, 16 N. W. R. 365.

² "If the carrier is not specified, the vendor, acting in this respect under the order of the purchaser to forward the goods, is his agent in the selection of the carrier, and in either case [whether the buyer names the carrier or not] the carrier is, in contemplation of law, chosen by the purchaser." *Kelsea v. Ramsey Mfg. Co.*, 55 N. J. L. 320, 26 Atl. R. 907, 22 L. R. A. 415.

³ *Robinson v. Pogue* (1888), 86 Ala. 257, 5 S. R. 685; *Comstock v. Affoelter* (1872), 50 Mo. 411; *Putnam v. Tillotson* (1847), 13 Met. (Mass.) 517; *Merchant v. Chapman* (1862), 4 Allen (Mass.), 362.

⁴ Where the undertaking to ship by a particular route or carrier is plain and unambiguous, it must be complied with, and evidence of an invariable custom to transship, or that there was no direct route or carrier from the place of shipment to the place of delivery, is inadmissible. *Iasigi v. Rosenstein*, 65 Hun (N. Y.), 591. So also *Hills v. Lynch* (1864), 3 Robt. (N. Y.) 42; *Wheelhouse v. Parr* (1886), 141 Mass. 593, 6 N. E. R. 787.

necessary that the delivery to the carrier by the seller shall be made in proper form and with due care and diligence. It must be such a delivery as will charge the carrier, and give to the buyer the right to claim indemnity against the carrier in case the goods are lost.¹

If the buyer directs, or the course of dealing between the parties requires, that the goods when shipped shall be insured, the seller must also see that the insurance is effected.²

¹ *Ward v. Taylor* (1870), 56 Ill. 494; *Davis v. Koenig* (1895), 165 Pa. St. 347. Where the seller of a safe, who had agreed to put it safely on board the cars, left it in such condition that it was injured by abrasion of bolts in the side of the car, the seller was held liable for the injury. *Diebold Safe Co. v. Holt* (1896), 4 Okl. 479, 46 Pac. R. 512. Where the goods, which were chairs, were taken to the wharf and left there without getting a receipt or calling any one's attention to them, Lord Ellenborough, in *Buckman v. Levi*, 3 Camp. 414, said: "A delivery of goods to a carrier or wharfinger with due care and diligence is sufficient to charge the purchaser; but he has a right to require that in making this delivery due care and diligence shall be exercised by the seller. Before the defendant can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked; and no person belonging to the wharf is fixed with a privity of their being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them. The person upon the wharf when the chairs were left might be a thief,

watching for an opportunity to purloin them; the defendant therefore is not furnished with a remedy over against the wharfinger, and is not himself liable as purchaser of the goods."

And in *Clarke v. Hutchings*, 14 East, 475, where the carrier had a well-known regulation not to be answerable for goods above a certain value unless entered and paid for as such, and the seller delivered goods of greater value without so entering them, the same judge said: "The plaintiff cannot be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, unless he took the usual and ordinary precaution, which the notoriety of the carriers' general undertaking required, with respect to goods of this value, to insure them a safe conveyance; that is, by making a special entry of them. He had an implied authority and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them in such a course of conveyance as that in case of a loss the defendant might have his indemnity against the carrier." *Cothay v. Tute*, 3 Camp. 129, is distinguishable.

² *Ante*, § 749; *New York Tartar Co. v. French*, 154 Pa. St. 273, 26 Atl. R. 425. See also *Bartlett v. Jewett*, 98 Ind. 206.

§ 1184. **Undertaking of seller to deliver the goods, how satisfied.**—Where, however, the seller expressly or impliedly undertakes to deliver the goods at the place where the buyer desires to have them, then, obviously, the delivery to the carrier is but one step in the performance of the seller's undertaking. The carrier, in this case, is the seller's agent, and the seller's duty is not performed until the goods have been transported to, and delivered at, their stipulated destination. Until that time the goods are at the seller's risk.¹

6. *What Constitutes Delivery.*

§ 1185. **In general.**—Having considered the questions of the seller's duty to deliver, the time and place of the delivery, the thing to be delivered, and to whom, it remains next to consider what acts will constitute such a delivery as will satisfy the seller's duty.

Because of the varying uses of the term, it must be recalled to mind that the question is not what acts are necessary or sufficient to pass the title, or what constitutes such an actual delivery as will uphold the sale against the seller's creditors, but, more narrowly and simply, what constitutes a delivery as between the parties — what acts, for example, will entitle the seller to sue the buyer for goods sold and delivered. It will be obvious that these questions are entirely disparate, and that what would satisfy the requirement of the law in one case might utterly fail to do so in the other.

§ 1186. **Delivery complete when goods properly placed at buyer's disposal.**—It is entirely competent for the parties to agree as to what shall constitute a delivery as between themselves, and their agreement in this respect will usually be given effect.² And though there is no express agreement, an implied

¹ *McLaughlin v. Marston*, 78 Wis. 687; *Sneathen v. Grubbs*, 88 Pa. St. 670, 47 N. W. R. 1058; *Braddock* 147; *Suit v. Woodhall*, 113 Mass. 391; *Glass Co. v. Irwin*, 153 Pa. St. 440, 25 Atl. R. 490; *McNeal v. Braun*, 53 N. J. L. 617, 26 Am. St. R. 441, 23 Atl. R. 512; *Devine v. Edwards*, 101 Ill. 138; *Higgins v. Murray*, 73 N. Y. 252.

² See *Stephens v. Gifford*, 137 Pa.

agreement may arise in a particular case from their previous course of dealing in similar cases, or from the circumstances of the case. In the absence of such an express or implied agreement, however, it may be said to be the general rule that, as between the parties themselves, the goods are delivered whenever, at the time and place which the law fixes or the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the goods completely and unconditionally at the disposal of the buyer.¹

§ 1187. What acts necessary in ordinary cases.—What acts are necessary in the ordinary case may be made more clear by recalling certain considerations already referred to. Thus, as has been already stated, in the absence of an express or implied agreement to the contrary, the place of delivery of the goods is the place at which they were at the time of the sale. So, in the absence of such an express or implied agreement to the contrary, the seller is not bound to send or carry the goods to the buyer, but he does all that he is bound to do by putting the goods at the buyer's disposal, so that he may take them without lawful obstruction. In the ordinary case, therefore, of the sale of definite and ascertained goods, situated in a known place — there being no agreement on the part of the seller to send or carry the goods to the buyer, either expressly entered into or fairly to be implied from the situation of the goods, the previous course of dealing of the parties, or the custom in like cases,—the delivery is complete as soon as, but not sooner than, the goods are unreservedly and unconditionally placed at the buyer's disposal.²

St. 219, 21 Am. St. R. 868, 20 Atl. R. 542; *Calcutta v. De Mattos*, 32 L. J. Q. B. 322; *Colorado Springs Co. v. Godding* (1894), 20 Colo. 249, 38 Pac. R. 58.

¹See following section. In *White v. Harvey* (1892), 85 Me. 212, 27 Atl. R. 106, a manikin was sent, in response to defendant's order, to him by express, but he did not take it

from the express office. As to whether there was a delivery the court said: "It is a general principle affecting this subject that whenever personal property is sold deliverable to a particular person or at a particular place for the buyer, a delivery to such person or at such place is a completed delivery to the vendee."

²*Wood v. Tassell* (1844), 6 Q. B. 234, 51

§ 1188. —. Having done this, the seller is in a situation to claim a performance of his contract by delivery, or to defend an action for non-delivery, though less than this, namely, readiness to so deliver, may be sufficient, either as a ground of

Eng. Com. L. 234; *Mitchell v. Le Clair* (1895), 165 Mass. 308, 43 N. E. R. 117 (citing many cases); *Middlesex Co. v. Osgood*, 4 Gray (Mass.), 447; *Phelps v. Hubbard* (1879), 51 Vt. 489; *Masters v. Teller* (1898), 7 Okla. 668, 56 Pac. R. 1067.

In *Gray v. Walton*, 107 N. Y. 254, 14 N. E. R. 191, where there was a sale of goods on the premises of the owner, the court said that the seller was "under obligation to deliver the goods on the premises, or, at least, to put them within the power or under the dominion of" the buyer. In *Smith v. Chance*, 2 B. & Ald. 753, *Holroyd, J.*, said: "A party cannot maintain an action for the price of goods sold and delivered until he has either delivered them or done something equivalent to delivery; as, for instance, if he has put it in the vendee's power to take away the goods himself." In *Steel Works v. Dewey*, 37 Ohio St. 242, there was a written contract to deliver the goods at a certain place, the premises of a third person. The seller did all he could to enable the buyer to get the goods, but the latter did not succeed. It was held that it was competent to show by parol evidence that the contract to deliver was made in view of certain regulations of the third person well known to both seller and buyer, and that the failure of the buyer to get the goods was owing to his inability to comply with those regulations and not to any default on the part of the seller, and therefore that the seller had fully performed.

Where a manufacturer of an article, for which no special place of delivery is appointed, has finished the article and given the person notice and opportunity to remove it, he has done all that is necessary to enable him to recover the price. *Goddard v. Binney*, 115 Mass. 450, 15 Am. R. 112. Where the contract of the manufacturer is simply to make the goods at an agreed price, he has fully executed the agreement on his part when the goods are produced at his factory ready to be delivered on demand. *Kelsea v. Ramsey Mfg. Co.*, 55 N. J. L. 320, 26 Atl. R. 907, 22 L. R. A. 415. To same effect: *Middlesex Co. v. Osgood*, 4 Gray (Mass.), 447; *Lucas v. Nichols*, 5 id. 309; *Higgins v. Murray*, 73 N. Y. 252.

In *Bement v. Smith* (1836), 15 Wend. 493, the plaintiff agreed to make and deliver a sulky at a particular time and place, and the defendant agreed to pay for it, on delivery, in a particular manner. The plaintiff made, and, so far as was in his power, delivered the sulky, offering it to the defendant according to the terms of the contract, but the defendant refused to receive it. *Held*, that these facts would sustain a declaration alleging performance on the part of the plaintiff by the delivery of the sulky.

Where the manufacturers of machinery were to deliver it at the railroad upon cars to be furnished by the buyer, it was held that they were not obliged to take it from the factory to the railroad, since the

action or defense, where the contract is executory and delivery and payment are to be concurrent acts.¹

§ 1189. Seller in readiness though buyer in default.—So where, by the terms of the contract, the seller is to deliver the goods at a particular place, at which the buyer is to receive

buyers, after notice, had neglected to provide cars. *Smith v. Wheeler*, 7 Oreg. 49, 33 Am. R. 698. But in *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104, where the manufacturer of railroad ties was to deliver them at the station on board cars to be furnished by the buyer, it was held that it was not sufficient that the seller had the ties at his mill, a mile and a half from the station, but that he should have taken them to the station and piled them near the track if there were no cars in readiness for them. In this case, however, no notice to furnish cars, or that the seller was ready to deliver, was given, nor other offer of delivery made. The seller relied simply upon the fact that it did not appear in the case that the cars were ready. The two cases are clearly distinguishable.

Many other cases respecting delivery of chattels to be manufactured appear in §§ 754–762, *ante*.

¹See *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 Bos. & P. 447; *Startup v. Macdonald*, 6 Man. & Gr. 593; *Jackson v. Allaway*, 6 id. 942.

In *Barton v. McKelway* (1849), 22 N. J. L. 165, a contract was made for the sale and delivery of a large number of nursery trees. When the time came for delivery the plaintiff measured, counted, tied up in bundles and carried the trees to the house of the defendant, according to contract.

But the defendant was not at home, and his wife refused to receive them or permit them to be laid on the premises. Accordingly the plaintiff laid them on the sidewalk in front of the defendant's house, and when the defendant returned home the following day he had them removed to his cellar. The court held that the plaintiff had done everything he could, and all the law bound him to do, to effect the delivery, and the defendant could not object that the delivery had not been legally made.

In *Pratt v. Maynard* (1874), 116 Mass. 388, it appeared that the vendee bought a boiler and paid for it, and the vendor, by direction of the vendee, placed the boiler on a lot in the rear of the former's shop. This was held a sufficient performance.

In *Hillestad v. Hostetter*, 46 Minn. 393, 49 N. W. R. 192, where lumber was to be furnished by defendants to plaintiffs in payment for goods, the court said: "The time for the delivery of the lumber and the prices are not specified in the agreement testified to by defendants. It was sufficient that they were ready and willing to furnish it when called for. They had a lumber yard amply stocked, and it was the plaintiffs' duty to apply for and select the lumber in payment of the amount of their claim; and they would be entitled to it at the current market rates."

them or provide vehicles for their further transportation, or inspect, weigh or measure them, the seller will perform on his part if he is ready to deliver the goods at the time and place specified, though an actual delivery may be defeated by the default of the buyer to perform on his own part.¹

¹ In *Sedgwick v. Cottingham* (1880), 54 Iowa, 512, the plaintiff contracted to sell to the defendant a carload of wheat to be shipped to a point named, where it was to be taken from the car by the defendant, and paid for upon being weighed by him. The plaintiff shipped the car of wheat, which reached the designated station, and was placed upon a side track, where it was accidentally destroyed. *Held*, that the plaintiff having completed the performance of his part of the contract, the delivery was complete, and the plaintiff was entitled to recover the purchase-money. See also *Bloyd v. Pollocks* (1885), 27 W. Va. 75.

In *Sanborn v. Benedict* (1875), 78 Ill. 309, a contract was made for the sale of two thousand bushels of corn, to be delivered at a certain place within ten days after defendant's request. Action was brought in *assumpsit*, and it was shown that the plaintiff, at all times after making the contract, had control of that quantity of corn, was ready to deliver it, and had offered to do so. The court held that he might recover, saying that it was not an easy matter for one to carry with him two thousand bushels of corn to tender to his purchaser, and it is sufficient if he is ready and willing, and offers to deliver it.

Where the seller was to put posts sold upon the buyer's boats, but the buyer furnished none, it was held that a delivery on the beach was sufficient. *Bolton v. Riddle*, 35 Mich. 13.

In *Lincoln v. Gallagher* (1887), 79 Me. 189, 8 Atl. R. 883, a contract of sale was made of a vessel, to be delivered to the buyer in Portland. The court said: "Had the defendant provided a suitable place at some dock or wharf, which could have been reached by the use of reasonable exertion, the delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor."

In *Hunt v. Thurman* (1843), 15 Vt. 336, a contract was made for the sale of from three hundred to one thousand cords of wood to be delivered on a certain dock before a stipulated day. It appeared, however, that the dock was not available for the purpose, and the wood, when delivered, was piled on the shore of the lake near the dock, one of the joint purchasers examining it and finding no fault with the wood or the place where it was being piled. The wood was to be measured by the purchasers when delivered, but through their negligence it was not measured and a large quantity was carried away by a rise in the lake. The court held that the vendor had done all that he could do, and all he was bound to do, to fulfill his contract.

In *Weld v. Came* (1867), 98 Mass. 152, the plaintiffs bought a billiard table from the defendants, paid for it, and told the defendants, who were to transport it to the wharf, that they would give notice when a ship was

§ 1190. — **Marking and setting aside.**— Like results will ensue where the goods are fully agreed upon, and are marked or set aside as the buyer's, ready for him to take them when he will, though in fact he may never take them away. As has

ready to take it. The defendants boxed it up and held it in their store room ready for shipment, but before notice was received it was destroyed by an accidental fire. *Held*, that defendants' agreement to take the table to the wharf was a circumstance to be considered by the jury as tending to show that the property was not delivered, but it was not conclusive, and other circumstances would authorize a jury to find that the sale was completed by the arrangement that plaintiffs should store it till a ship was ready.

In *Washburn Iron Co. v. Russell* (1881), 130 Mass. 543, a number of tons of iron rails were purchased and carried by the vendor to the place designated in the contract. The vendee went to the place where the iron was left, took the numbers of the cars in which it was loaded, and, not being able to move the iron with his own hand, went to get an engine to draw the cars into his yard. He obtained the engine, but before it had moved the cars the iron was attached. *Held*, that there was evidence to prove a delivery before the attachment.

In *Hening v. Powell* (1863), 33 Mo. 468, the plaintiffs sold a large number of barrels of flour to defendants, to be put aboard such boats as defendants should designate. Two boats were thus named and the flour was put on board, but the plaintiffs retained the dray tickets on three hundred and fifteen barrels, and the defendants claimed that there was

no delivery as to these, since it was shown to be the custom in St. Louis for a vendor to surrender the dray tickets to his vendee in order that the latter might obtain bills of lading. The court held the custom immaterial, and that the plaintiffs had fully complied with the terms of the contract, the power to control the disposition of the property having passed to the vendees.

In *Odell v. Railroad Co.* (1871), 109 Mass. 50, the plaintiff made a contract with one Swasey, at Exeter, for the purchase from Swasey of a lot of hay to be delivered to the plaintiff at the depot of the defendant in Exeter. The hay was to be weighed in Boston after its arrival there. Swasey delivered the hay as directed, and told defendant's agent to mark it with plaintiff's name and transport it to him in Boston. *Held*, that delivery to the defendant's agent vested the title in the plaintiff.

On the other hand, in *Woodbury v. Long* (1829), 8 Pick. 543, the plaintiff contracted to make some pews for one Johnson, who was building a church. The pews were made and were transported by the plaintiff to the place where the church was being built, Johnson having drawn an order on the church committee which was to be paid upon delivery of the pews. But the committee refused to accept the order and rejected the pews. The plaintiff thereupon left the pews in the church, and they were piled up by themselves by Johnson's workmen, he

been already seen, title may pass, as between the parties, without delivery, and, if a delivery is necessary, any unconditional placing of the goods at the buyer's disposal will suffice where the parties have not stipulated otherwise.¹

himself being away at the time. *Held*, that there was no delivery. So in *Council Bluffs Iron Works v. Cuppey* (1875), 41 Iowa, 104, where a large number of ties were to be delivered on board cars of the Rock Island Railway at a certain station, evidence that the vendor's mill was located only a few rods from the railroad, and a mile and a half from the said station; that he sawed out the ties and piled them up ready for delivery, some at his mill, some at his house, and some at the station designated for delivery, and that he could have put them on the cars at any time if the vendee had provided the cars in accordance with the contract, would not prove delivery or excuse non-delivery.

In *Sibley v. Tie* (1878), 83 Ill. 287, an agreement was made between vendor and vendee that the former should haul a lot of corn and put it in the latter's cribs, but that the vendee should have no claim upon it until paid for. On the faith of this reservation, which was in writing, the vendor began putting the corn into the vendee's cribs, but before it was all in the vendee sold it and attempted to deliver possession. *Held*, that no title passed by the last sale for want of delivery by the first vendor.

¹ Thus in *Merrill v. Parker* (1844), 24 Me. 89, the action was for goods sold and delivered. It appeared that a price was offered by the defendant for the article, and accepted by the plaintiff, and the defendant then said he "would come in a short time and

take it, and pay for it," and it was marked as sold to him in his presence, and set aside in the plaintiff's shop and reserved for his use, and thus remained until the commencement of this suit. It was held that the action could be maintained.

In *Griswold v. Scott* (1894), 66 Vt. 550, 29 Atl. R. 1013, the plaintiffs were wholesale and the defendants retail dealers in flour, and the defendants were accustomed to purchase of the plaintiffs by the carload. The flour was charged in open account to the defendants at the date of the purchase, whether it had arrived or not, and when it did arrive the plaintiffs stenciled the name of the defendants' firm upon each barrel and piled them together in a particular part of the store, from which the flour was taken by the defendants as they had occasion to use it. The court said that both parties seemed to treat this marking and setting apart as a delivery to the defendants, and they held that there had been a delivery by the plaintiffs and an acceptance by the defendants according to the usual course of dealing between the parties.

In *Brewer v. Salisbury* (1850), 9 Barb. 511, the plaintiff bargained with W., a tanner, for the purchase of fifteen sides of harness leather, which were then in W.'s shop, in an unfinished state, at a certain price per pound when finished. The plaintiff paid W. \$30 as the probable value of the leather; and if it should exceed that amount the plaintiff was

§ 1191. — Where goods are on seller's land — License.

Pursuing the general rule of the last section a little more fully into details, if the goods, at the time of the sale, are on the seller's premises or under his control and the buyer is to come to get them, it is clearly the seller's duty to do or permit what is reasonably requisite to make the goods available.

"A sale of chattels," said the court in Massachusetts,¹ "which are at the time upon the land of the seller, will authorize an entry upon the land to remove them, if, by the express or implied terms of the sale, that is the place where the purchaser is to take them. A license is implied because it is necessary in order to carry the sale into complete effect; and is therefore presumed to have been in contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before severance." Upon the last qualification of this statement, however, the authorities are not agreed, some cases holding that even before severance the license cannot be withdrawn.²

to pay the excess. W. notified the plaintiff when the leather was finished and desired him to call and select the sides he had purchased. The next day the plaintiff went to W.'s shop and took away five sides. The plaintiff and W.'s servant, by W.'s direction, selected nine sides and put them by themselves in the middle of the shop, and some others which were hung up. The sides remained to be cleaned, which was about three hours' work, and then W.'s servant was to send them to the plaintiff. Held, that the delivery was complete.

¹In *McLeod v. Jones* (1870), 105 Mass. 403, 7 Am. R. 539 [citing *Wood v. Manley*, 11 Ad. & El. 34; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34; *Giles v. Simonds*, 15 Gray (Mass.), 441, 77 Am. Dec. 373; *Drake v. Wells*, 11 Allen (Mass.), 141; *McNeal v. Emerson*, 15 Gray (Mass.), 384]. To same effect: *Miller v. State* (1872), 39 Ind. 267; *Gray v. Walton* (1887), 107 N. Y. 254, 14 N. E. R. 191; *Yale v. Seely* (1843), 15 Vt. 221; *Smith v. Hale* (1893), 158 Mass. 178, 33 N. E. R. 493, 35 Am. St. R. 485.

²See *ante*, § 336 *et seq.*; *Miller v. State*, *supra*.

§ 1192. — **Where goods in custody of a third person.**— So if the goods at the time of the sale are in the custody of a third person, and there are any impediments or obstacles in the way for which the seller is responsible and which will prevent the buyer from obtaining the goods freely and unconditionally, the seller has not performed his duty of delivery until he has removed those obstacles. Thus, if license to enter upon the premises of such third person is necessary, the seller must procure such license;¹ if conditions precedent to the removal of the goods remain unperformed, the seller must perform them before he can be said to have delivered the goods.²

§ 1193. — **Where goods in possession of a bailee — Attornment.**— Again, if the goods are in the possession of the third person as bailee for the seller, the delivery is usually considered incomplete until such third person assents to attorn to the buyer and become his bailee instead of that of the seller.³

Such assent may, indeed, be given in advance to attorn to any person who may become the buyer, and if so given before the sale cannot be revoked after it.⁴ It may also be presumed where, after notice of the sale, the bailee continues without objection to hold the goods,⁵ and in some cases mere notice to the bailee has been thought sufficient.⁶

¹ See *Salter v. Woollams*, 2 Man. & Gr. 650.

² *Smith v. Chance*, 2 Barn. & Ald. 753.

³ *Bentall v. Burn*, 3 Barn. & Cr. 423; *Edwards v. Meadows*, 71 Ala. 42; *Bassett v. Camp*, 54 Vt. 232; *Townsend v. Hargraves*, 118 Mass. 325; *Spaulding v. Austin* (1829), 2 Vt. 555; *Barney v. Brown* (1829), 2 Vt. 374.

⁴ *Salter v. Woollams*, 2 Man. & Gr. 650, 40 Eng. Com. L. 789. See also *Russell v. O'Brien* (1879), 127 Mass. 349.

⁵ *Buhl Iron Works v. Tenton* (1888), 67 Mich. 623, 35 N. W. R. 804.

⁶ In *Carter v. Willard* (1837), 19 Pick.

(Mass.) 1, both parties had notified the bailee of the sale and he continued to hold without objection. *Held*, sufficient. So in *Pierce v. Chipman* (1836), 8 Vt. 334.

Where, at the time of the sale of personal property, it is in the possession of one who has a lien upon it, notice to him of such sale constitutes a sufficient delivery. *Freiburg v. Steenlock* (1893), 54 Minn. 509, 56 N. W. R. 175 (citing *Appleton v. Bancroft*, 10 Metc. (Mass.), 231; *Dempsey v. Gardner*, 127 Mass. 381); *Tuxworth v. Moore* (1830), 9 Pick. (Mass.) 347.

A written order upon the person in possession to deliver to the buyer will

§ 1194. — **Delivery by transfer of bill of lading or warehouse receipt.**— So, by the custom of merchants, the delivery may be deemed complete without attornment, as in the case of the transfer of a bill of lading, which represents the goods;¹ and also, by statute or custom in most states, though not by the English common law,² in the case of the transfer of a warehouse receipt or like document by the terms of which the goods are deliverable to the seller or his order.³ In these cases the bailee can fairly be said to have assented in advance to attorn to the lawful holder of the paper.

§ 1195. — **Delivery to carrier.**— It has been seen in preceding sections that there may, by the express or implied consent of the buyer, be a sufficient delivery of the goods by putting them into the custody of a carrier for transportation to the buyer.⁴ But such a delivery to the carrier must, as has been seen, be not only made with due care, but it must be unconditional and without the reservation of any other claim upon the goods than that of stoppage *in transitu*. Other forms of delivery to the carrier, such as that which retains the *jus*

suffice where that is the best form practicable. *Stokes v. Mackey* (1895), 147 N. Y. 223, 41 N. E. R. 496. See also *McCormick v. Hadden* (1865), 37 Ill. 370.

¹The indorsement and delivery of a bill of lading transfers the property and is a complete legal delivery of the goods. Per Erle, C. J., in *Meyerstein v. Barber*, L. R. 2 C. P. 37; *Wadhams v. Balfour* (1898), 32 Oreg. 313, 51 Pac. R. 642; *Webster v. Granger* (1875), 78 Ill. 230; *Michigan Central R. Co. v. Phillips* (1871), 60 Ill. 190; *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350; *McKee v. Garcelon*, 60 Me. 165, 11 Am. R. 200; *Stone v. Swift*, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226; *Tilden v. Minor*, 45 Vt. 196; *Joslyn v. Grand Trunk Ry. Co.*, 51

Vt. 92; *Robinson v. Stuart*, 68 Me. 61; *Hazard v. Fiske*, 83 N. Y. 287; *Dodge v. Meyer*, 61 Cal. 405; *Campbell v. Alford*, 57 Tex. 159; *Russell v. O'Brien* (1879), 127 Mass. 349.

²See *Blackburn on Sale*, 415; *Farina v. Home*, 16 Mees. & Wels. 119. See also criticism by Mr. Benjamin, *Sale* (6th Am. ed.), § 816.

³See *Farnum v. Pitcher* (1890), 151 Mass. 470, 24 N. E. R. 590; *Zellner v. Mobley* (1890), 84 Ga. 746, 20 Am. St. R. 390, 11 S. E. R. 402; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, 9 Am. R. 603; *Gill v. Frank*, 12 Oreg. 507, 53 Am. R. 378, 8 Pac. R. 764; *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. R. 433; *Newcomb v. Cabell* (1874), 10 Bush (Ky.), 460.

⁴See *ante*, § 1175.

disponendi,¹ may be sufficient to satisfy an executory agreement for concurrent delivery and payment; but where, as in the cases now under consideration, delivery requires the putting of the goods at the complete disposal of the buyer, it is not satisfied by a delivery to the carrier upon a bill of lading to the seller's own order which he has neither indorsed nor transferred to the buyer.²

§ 1196. — **Delivery by carrier.**— Where the contract is to deliver the goods by carrier at a specified place, the seller's undertaking cannot be deemed to be performed until he has them, ready for delivery at least, at the place specified. In such a case, as has been seen,³ the carrier is the agent of the seller, and the delivery cannot usually be deemed complete until the carrier has made such a delivery as would ordinarily be requisite to release him from his liability as carrier. What this delivery is varies, of course, with the nature of the business of the carrier — whether he be a land or water carrier, a railroad or express company. Space will not permit nor is it necessary to discuss those questions here, as they have been fully dealt with in other places.⁴

§ 1197. — **Delivery where goods are bulky or not capable of manual delivery — Symbolical delivery.**— There are cases also where an actual manual tradition of the goods is

¹ See *ante*, § 769.

² *Van Valkenburg v. Gregg*, 45 Neb. 654, 63 N. W. R. 949. But, though the goods were shipped in the seller's name, if they were so shipped with notice to the carrier to deliver to the buyer, and he could readily obtain them, he cannot complain of the method of shipment. *McKay v. McKenna* (1896), 173 Pa. St. 581, 34 Atl. R. 236.

³ See *ante*, § 1184.

⁴ See Mechem's *Hutchinson on Carriers*, "Delivery by Carrier," ch. IX, § 338 *et seq.*

Where by the contract the seller is to deliver by water f. o. b. at a certain place, and the master of the vessel on arrival gives the buyer sufficient notice and a reasonable opportunity to receive, inspect and care for the goods, it becomes the duty of the buyer to be ready to receive them, and if the goods are subsequently injured through the buyer's neglect to so receive and care for them, the loss falls on him. *Heinberg v. Cannon* (1896), 36 Fla. 601, 18 S. R. 714.

unnecessary to constitute a complete delivery as between the parties. Thus where the goods are bulky, inaccessible, or otherwise of such a nature or in such a situation that their physical surrender into the hands of the buyer is impossible, impracticable or highly inconvenient, it is clear that such other act as the case does reasonably admit of may be accepted as sufficient.¹ A bill of sale or other documentary evidence, or the transfer of some symbol of the goods, are illustrations of such an act. For like reason the delivery of the key of the warehouse in which the goods are stored has often been cited as sufficient.²

This question arises most frequently in contests with creditors of the seller, and the question of the sufficiency of a constructive or symbolical delivery in such cases has been considered in another place.³ The requirements in the two cases are not the same, but certainly if the delivery would be good as against creditors it must, *a fortiori*, be sufficient as between the parties.

§ 1198. — Delivery where goods are retained by seller as bailee of buyer.—It has been seen in earlier sections⁴ that there may be such an acceptance and receipt of the goods as will satisfy the requirements of the statute of frauds notwithstanding that the goods are retained by the seller in his possession, where they have been unreservedly placed at the buyer's

¹ *Jewett v. Warren* (1815), 12 Mass. 300, 7 Am. Dec. 74; *Parry v. Libbey* (1896), 166 Mass. 112, 44 N. E. R. 124; *Kingsley v. White*, 57 Vt. 565; *Leonard v. Davis*, 1 Black (U. S.), 476, 17 L. ed. 223; *Gibson v. Stevens*, 8 How. (U. S.) 384, 12 L. ed. 1123; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Hilton v. Tucker* (1888), 39 Ch. D. 669; *Puckett v. Reed* (1876), 31 Ark. 131; *Goddard v. Weil* (1895), 165 Pa. St. 419, 30 Atl. R. 1000; *Williams v. Rolling Mill Co.* (1896), 174 Pa. St. 299, 34 Atl. R. 442.

In *Williams v. Rolling Mill Co.*,

supra, where there was a sale of a large pile of iron, it was pointed out by the seller to the buyer, and the latter caused a large placard to be placed upon it to the effect that it was his property.

² In *Kellogg Newspaper Co. v. Peterson* (1896), 162 Ill. 158, 44 N. E. R. 411, heavy printing machinery was sold. The room in which it was contained was locked and the key delivered to the buyer. *Held*, sufficient.

³ See *ante*, § 964.

⁴ See *ante*, § 384.

disposal and accepted by him and the seller retains them, not as seller, but as a mere bailee of the buyer. Such a delivery would undoubtedly satisfy the requirements of the kind of performance now under consideration, namely, the delivery of the goods as between the parties.¹ "An agreement of the vendor to hold the goods in storage for the vendee is equivalent to a delivery."²

§ 1199. — Delivery of growing crops.— A growing crop, in the nature of the case, is incapable of an actual manual delivery. There may be a change of possession of the land upon which the crop is growing, but of the crop itself there can be no actual delivery until it has been severed from the soil. At the utmost, therefore, there can be but a symbolical or constructive delivery, and this is clearly sufficient as between the parties, and the buyer will not be required to take manual possession until it is time to harvest the crop.³

¹See *Bank of Huntington v. Napier* (1895), 41 W. Va. 481, 23 S. E. R. 800; *White v. McCracken* (1895), 60 Ark. 613, 31 S. W. R. 882; *Hagins v. Combs* (1897), 102 Ky. 165, 43 S. W. R. 222; *Barrett v. Goddard* (1822), 3 Mason (U. S. C. C.), 107, Fed. Cas. No. 1,046; *Janvrin v. Maxwell* (1868), 23 Wis. 51; *Griswold v. Scott* (1894), 66 Vt. 550, 29 Atl. R. 1013; *Green v. Merriam* (1856), 28 Vt. 801; *Goodwin v. Goodwin* (1897), 90 Me. 23, 87 Atl. R. 352; *Means v. Williamson* (1854), 37 Me. 556.

²*Weld v. Came* (1867), 98 Mass. 152. In *Means v. Williamson* (1854), 37 Me. 556, a chaise was sold, which was to remain in the plaintiff's stable at defendant's convenience and for his accommodation, until he could build a shed for it. *Held*, that under such circumstances the delivery was completed.

³See *Branton v. Griffiths*, L. R. 2 C. P. Div. 212; *Ticknor v. McClelland*, 84

Ill. 471; *Thompson v. Wilhite*, 81 Ill. 356; *Graff v. Fitch*, 58 Ill. 373; *State v. Durant*, 53 Mo. App. 493.

"A growing crop, until ready for the harvest, cannot by itself become the object of a delivery, and can only be delivered into the possession of the vendee by delivering to him the possession of the land of which it is a part. . . . Growing crops, in respect to delivery, are not unlike ships and cargoes at sea, of which delivery cannot be made until they reach port. If delivery of ship and cargo be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers." *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340.

In *Stearns v. Washburn* (1856), 7 Gray, 187, the court held that an action for goods sold and delivered could not be maintained on a contract of sale of grass growing on a certain lot, where the grass was to

§ 1200. — Delivery of articles situate on land sold.—

Where there is a sale or transfer of land together with personal property situate thereon, the delivery of possession of the land is ordinarily a sufficient delivery of the chattels. "Possession of and title to the realty on which the personalty was," said the court in a recent case,¹ "would be enough to invest the purchaser with full dominion over it, unless there was some obstacle to the exercise of such dominion; and it could and should be presumed that no other or different delivery was contemplated by the parties, unless something was expressly mentioned from which a different intention could fairly be inferred."

§ 1201. — Delivery of goods or vessel at sea.— "When goods are at sea," it is said,² "it is manifest that the only delivery which can be made is that of some token or evidence of

be, and might have been, cut and carried away, but was not.

In *Ross v. Welch* (1858), 11 Gray, 235, a contract was made for the sale of growing cabbages. In August the parties went upon the land where the cabbages were, and agreed that those growing there should be taken when ready to be severed; and in November, when the cabbages were ready to be gathered, they agreed on the number. The court held that an agreement to sell articles ready to be delivered and taken away, though still standing on the soil, unrevoked, is sufficient delivery to give effect to the sale between the parties.

¹ *Hall v. Morrison* (1893), 92 Ga. 311, 18 S. E. R. 293. On a contract for the sale of a farm and all farming implements, etc., thereon, no time being specified for delivery of this property, "the necessary inference is that it was to be left on the farm or delivered when the buyer took possession." *Hackbarth v. Wollner* (1894), 88 Wis. 476, 60 N. W. R. 704.

² *Pratt v. Parkman* (1834), 24 Pick. (Mass.) 42.

Where a vessel is sold while at sea, it is sufficient for the vendee, in order to maintain his title against a subsequent purchaser or attaching creditor, to take possession of her without any unreasonable delay after her arrival. *Joy v. Sears* (1829), 9 Pick. (Mass.) 4.

On a sale of a ship or goods at sea, "it is well settled that, if possession be taken in a reasonable time after their arrival, the vendee is entitled to hold them, even against a creditor of the vendor who has attached them before the vendee could obtain possession." *Ricker v. Cross* (1832), 5 N. H. 570, 22 Am. Dec. 480 [citing *Wheeler v. Sumner*, 4 Mason, 183, 1 Peters, 449; *Portland Bank v. Stacey*, 4 Mass. 661, 3 Am. Dec. 253; *Portland Bank v. Stubbs*, 6 Mass. 422, 4 Am. Dec. 151; *Meeker v. Wilson*, 1 Gall. 419].

But this principle was held not to prevail where the ship is not at sea,

ownership. And this is always deemed in law equivalent to an actual delivery. In relation to vessels at sea, a delivery of a bill of sale is deemed sufficient.¹ The same principle applies to all other chattels in the same situation. And it may be laid down as a general rule, that, when there can be no manual delivery of the whole or any part of the goods sold, a delivery of the muniments of title will be a good symbolical delivery and will pass the property, provided the purchaser uses due diligence to obtain the actual possession.

"The delivery of a bill of sale, or of a bill of lading, or of an invoice of goods at sea, would be sufficient to pass them."² In several cases the courts have gone further and held that where it is not in the power of the vendor to deliver any of these documents, the property will pass without it, provided proper exertion be used to make the earliest practical delivery."

These rulings have usually been made in cases involving the question of the sufficiency of the delivery as against the seller's creditors, but certainly a delivery which would suffice for that purpose would be sufficient in the cases now under consideration.

§ 1202. — Delivery where goods already in possession of buyer.— Where the goods are already in the possession of the buyer, nothing more than the unconditional and completed contract of sale is necessary. It is needless that the parties shall go through the idle ceremony of restoring the goods to the possession of the seller in order that he may immediately return them to the buyer.³ By the hypothesis the parties have

e. g., a sail boat upon the water moored and kept within easy reach. *Veazie v. Somerby* (1862), 5 Allen (Mass.), 280.

¹Citing *Putnam v. Dutch*, 8 Mass. 287; *Lamb v. Durant*, 12 Mass. 54; *Badlam v. Tucker*, 1 Pick. 389.

²Citing *Caldwell v. Ball*, 1 T. R. 205; *Gallop v. Newman*, 7 Pick. 282; *Gardner v. Howland*, 2 Pick. 599; *Conard v. Atlantic Ins. Co.*, 1 Peters, 386.

³*Hayden v. Frederickson* (1899), 59 Neb. 141, 80 N. W. R. 494; *Norton v. Hummel* (1887), 22 Ill. App. 194. In *Warden v. Marshall* (1868), 99 Mass. 305, the plaintiff made a contract with the defendant to sell him a number of barrels of oil, of a certain quality, at an agreed price, to be delivered at a bonded warehouse in Philadelphia during a certain month, at buyer's option on ten days' notice within the month. The plaintiff had

done everything required to be done except to transfer the possession, and that has been already done.

the requisite quantity of such oil for him at a fixed price, and the brokers sold it to the plaintiffs. It was ready for delivery in a bonded warehouse in Philadelphia. The market held that since the oil was already price of oil having fallen, the defendant, about the 20th of the month, in the plaintiff's possession in the bonded warehouse, no other delivery employed some brokers to sell the oil was necessary to complete the sale.

CHAPTER IV.

OF PERFORMANCE OF CONDITIONS BY THE SELLER.

§ 1203. In general.	§ 1213. Merchantability a condition precedent.
1204. Performance by seller of express conditions.	1214. Fitness for intended use a condition precedent.
1205. Performance by seller of implied conditions, often called implied warranties.	1215. Time, place and quantity as conditions precedent — Time.
1206–1208. Stipulations in executory contracts as conditions.	1216. — Quantity.
1209. Identity of kind a condition precedent.	1217. — Place.
1210. Correspondence to description a condition precedent.	1218. Difference in legal effect between condition and warranty.
1211. — Opportunity for inspection.	1219, 1220. Condition precedent becoming warranty after acceptance.
1212. Conformity to sample a condition precedent.	

§ 1203. **In general.**—It is the duty of the seller not only to transfer the title and deliver possession of the goods sold, but also to comply with and perform all the stipulations and agreements which have been expressly or impliedly made conditions of the liability of the buyer.

These conditions may be either express or implied, and, also, either precedent or subsequent.

§ 1204. **Performance by seller of express conditions.**—The seller must, of course, perform, unless they are waived, all the acts which by express terms have been made conditions of the sale. If he does not do so, and the condition is a precedent one, the liability of the buyer will not attach; and, if it is a condition subsequent, the buyer may repudiate the sale.

These express conditions may be attached either to executed

or executory contracts of sale, and they may be of any lawful act or event which the parties see fit to designate.¹

Cases of this nature, however, depend upon principles so well settled that no extended discussion of them is necessary.

§ 1205. Performance by seller of implied conditions, often called implied warranties.—There is, however, a class of duties incumbent upon the seller, not expressly imposed by the parties as formal conditions, but growing out of the very fact and essence of the contract of sale, the performance of which by the seller is in law a condition precedent to any obligation on the part of the buyer. Thus, for example, sale being the transfer of the absolute or general title to the chattel, it is clear that it is a condition precedent—lying at the very threshold of the whole contract—that the seller has such a title which he can so convey.

§ 1206. Stipulations in executory contracts as conditions. So, where the contract is executory and the chattel not yet ascertained, but the seller has undertaken to supply a chattel of a certain kind, it is equally a condition precedent, to any liability on the part of the buyer, that the seller shall in fact supply a chattel of that kind. This duty of the seller is usually spoken of in the United States as an implied warranty; but if a warranty be an incidental contract collateral to a principal one as it is usually defined, it is clear enough that this duty of the seller to transfer the title, or supply the chattel of the kind stipulated, is not a collateral or incidental one, it is the primary one—it is the very essence of the contract—it is the contract.

§ 1207. Thus, in a case² often cited, Lord Abinger said: “Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and, though part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the

¹ See *ante*, § 651.

² *Chanter v. Hopkins* (1838), 4 Mees. & Wels. 399.

circumstance of a party selling a particular thing by its proper description has been called a warranty, and a breach of such contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as, if a man offers to buy *peas* of another, and he sends him *beans*, he does not perform his contract: but that is not a warranty; there is no *warranty* that he should sell him peas; the *contract* is to sell peas, and if he sell him anything else in their stead it is a non-performance of it. So, if a man were to order copper for sheathing ships — that is, a particular copper, prepared in a particular manner, — if the seller send him a different sort, in that case he does not comply with the contract; and though this may have been considered a warranty, and may have been ranged under the class of cases relating to warranties, yet it is not properly so.”

§ 1208. —. So, in a case¹ before the supreme court of the United States, it is said: “When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.”²

“So, in a recent case³ decided by this court, it was said by Mr. Justice Gray: ‘A statement,’ in a mercantile contract, ‘descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense which that term is used in

¹ Pope v. Allis (1885), 115 U. S. 363, 371. Woodle v. Whitney, 23 Wis. 55; Boothby v. Scales, 27 Wis. 626; Fair-

² Citing Chanter v. Hopkins, *supra*; field v. Madison Mfg. Co., 38 Wis. 346. Barr v. Gibson, 3 M. & W. 390; Gompertz v. Bartlett, 2 El. & Bl. 849; ³ Norrington v. Wright, 115 U. S. 188. See also Filley v. Pope, 115 U. S. Okell v. Smith, 1 Stark. N. P. 107; 213.

insurance and maritime law,—that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.’

“And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited; and, if they do not correspond, the buyer may refuse to receive them, or, if received, he may return them in a reasonable time allowed for examination and thus rescind the contract.”¹

§ 1209. Identity of kind a condition precedent.—Where, therefore, there is an agreement for the sale of a particular thing, it is clear that the seller’s engagement to supply that thing is a condition precedent to the buyer’s liability. Thus where there was a contract for the sale of a certain kind of steel scrap,² the court said: “It is a mistake to assume that doctrines applicable to warranties have any reference to or can be invoked in this controversy. The contract, whether treated as evidenced alone by the writings referred to, or as consisting of both the writings and the parol interviews, is obviously not an agreement warranting the steel scrap to be of a designated or prescribed quality; but in whichever light the contract may be viewed, it is impossible to escape the conclusion that it was an agreement for the purchase by the appellee and for the sale by the appellant of a specific, designated thing; and that thing was, not steel of a described grade free from a named percentage of sulphur and phosphorus, *but steel scrap from the plates, beams and angles of United States cruisers* built by the appellant. This was the named and designated—the specific and identical—thing contracted for; and the substitution of any other or different material, no matter what its

¹ Citing *Lorymer v. Smith*, 1 B. & (1886), 84 Ky. 558, 2 S. W. R. 248; Cr. 1; *Magee v. Billingsley*, 3 Ala. 679. *Wolcott v. Mount* (1873), 36 N. J. L. 262, 13 Am. R. 438; *Jones v. George*

² *Columbian Iron Works v. Douglass* (1896), 84 Md. 44, 34 Atl. R. 1118, (1884), 61 Tex. 345, 48 Am. R. 280; 57 Am. St. R. 362, 33 L. R. A. 103. *Varley v. Whipp* (1900), 1 Q. B. 513.

To like effect: *Fogg v. Rodgers*

quality or chemical test might be, was a clear breach of the undertaking entered into by the parties."

§ 1210. Correspondence to description a condition precedent.—"When a person buys a particular thing," continued the court,¹ "he cannot be compelled to take some other thing, even if like the thing bought. He has a right to insist on the terms of his contract. If he has unwittingly received that which he has not bought he has the right to return it, or, keeping it, to recoup, when sued for the stipulated price, the damages which a failure to comply with the contract has caused him; or finally, if he has paid the purchase price he has the legal right to sue for and to recover back the difference in value between the price which he paid for an article he did not get and the market price of the substituted article delivered to and retained by him. He cannot, if he has purchased a cargo of peas, be required to take a cargo of beans. Before a defendant can be compelled to take anything in fulfillment of a contract of sale, it must be shown not merely that it is equally as good as the article that was sold, but that it is the *same* article he has bargained for and none other.

"In other words, if the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed the purchaser is entitled to reject the article, or, if he has paid the purchase price, he is entitled to recover back the price as money had and received for his use.

"It can make no possible difference whether the failure of the plaintiff to receive what he contracted to get grew out of the fraud of the defendant or out of an accident unimixed with bad faith."

§ 1211. — Opportunity for inspection.—In another case² the court said: "When a vendor sells an article by a particular description it is a condition precedent to his right of action

¹In *Columbian Iron Works v.*
Douglass, *supra*.

²Fogel v. Brubaker (1888), 122 Pa.
St. 7, 15 Atl. R. 692.

that the thing which he offers to deliver, or has delivered, should answer the description. If this condition be not performed the purchaser is entitled to reject the article, or, if he has paid for it, he may recover back the price as money had and received to his use. The right to repudiate the purchase for non-conformity of the article delivered to the description under which it was sold is universally conceded; and it comports with sound legal principles to treat such engagements as conditions in order to afford a purchaser a more enlarged remedy by rescission than he would have on a simple warranty; and, as an inspection of the goods is necessary to enable the buyer to ascertain whether they answer the description by which they were sold, it follows that a seller is bound to give the buyer an opportunity to make such inspection, and an acceptance by a buyer for that purpose will not be a waiver of his right to reject if the goods do not answer the description."

§ 1212. Conformity to sample a condition precedent.—

For like reasons, where goods have been sold by sample it is also a condition precedent¹ to the seller's liability that the bulk, both in nature and quality, shall correspond to the sample. If it does not the buyer need not receive it, and if, on examination after receipt,—and for this purpose the buyer is entitled to a reasonable opportunity,—it proves not to correspond, he may reject it.²

§ 1213. Merchantability a condition precedent.— So, also, "in every contract to supply goods of a specified description which the buyer has had no opportunity to inspect, the goods must not only answer the specific description, but must also be salable or marketable under the description." Even in the

¹ Usually called a *warranty*; as to which, see *post*, § 1320 *et seq.* Waring v. Mason (1837), 18 Wend. (N. Y.) 425; Bach v. Levy (1886), 101

² Heilbutt v. Hickson (1872), L. R. N. Y. 511, 5 N. E. R. 345, and many other cases cited under the same heading in the following chapter on (1842), 3 Ala. 679; Beirne v. Dord (1851), 5 N. Y. 95, 55 Am. Dec. 321; Warranty.

absence of any express stipulation, "this is an implied term¹ in every such contract."² If they are not such the buyer may reject them.

§ 1214. Fitness for intended use a condition precedent.—And again, where a manufacturer or dealer undertakes to furnish an article which he manufactures or in which he deals, in order that the buyer may apply it to some purpose which he discloses to the seller, and the contract is made under such circumstances as to indicate a purpose to put upon the seller the responsibility of furnishing an article fit for the purpose so disclosed, it is an implied condition³ that the article supplied shall be reasonably adapted to the purpose to be so subserved.⁴ If the article be not so fit, the buyer may refuse to accept it when tendered, or, on discovery after reasonable opportunity for examination, may reject it.

§ 1215. Time, place and quantity as conditions precedent — Time.—So, as has been seen in the preceding chapter on delivery, stipulations in executory contracts concerning the time and place of shipment or delivery and the amount to be so shipped or delivered are usually regarded as being of the essence of the contract, and compliance is a condition precedent to the buyer's liability. To recall a rule already quoted,⁵ it is said by Mr. Justice Gray in the supreme court of the United

¹ Usually denominated a *warranty*, and so dealt with in the following chapter, § 1340 *et seq.*

² Jones v. Just, L. R. 3 Q. B. 197; Warner v. Arctic Ice Co. (1883), 74 Me. 475; Hood v. Bloch (1886), 29 W. Va. 244; Fogel v. Brubaker (1888), 122 Pa. St. 7, 15 Atl. R. 692; Swett v. Slumway (1869), 102 Mass. 365, and many other cases under the same heading in the following chapter on Warranty.

³ Usually designated a *warranty*, and as such fully considered in the following chapter, § 1343 *et seq.*

⁴ Jones v. Just, L. R. 3 Q. B. 197; Gerst v. Jones (1879), 32 Gratt. (Va.) 518; Jones v. Padgett, 24 Q. B. Div. 650; Breen v. Moran (1892), 51 Minn. 525, 53 N. W. R. 755; Best v. Flint (1886), 58 Vt. 543; Hight v. Bacon (1878), 126 Mass. 10, and many other cases cited under the same heading in the following chapter on Warranty.

⁵ See *ante*, §§ 1129–1153, where the question of the *time* of delivery is fully considered.

States: "In the contracts of merchants *time* is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law,—that is to say, *a condition precedent*, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract."¹

§ 1216. — **Quantity.**— And in the same case² it is said: "The seller is bound to deliver the *quantity* stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

§ 1217. — **Place.**— Like effect usually is to be given to stipulations respecting the *place* of delivery. The contract may be silent as to the place, and then the law supplies the deficiency,³ or there may be an express stipulation concerning the place, and then the contract prevails. Where the place at which the seller is to deliver is thus stipulated, performance by delivery at that place is, unless waived, a condition precedent to the buyer's liability.⁴

The several matters of time, place and quantity have, however, been so fully dealt with in the preceding chapter that

¹ In *Norrington v. Wright* (1885), 115 U. S. 188, 203.

² *Norrington v. Wright*, *supra*, pp. 204, 205. See also as to *quantity* the full discussion in preceding chapter, § 1157 *et seq.*

³ See preceding chapter, §§ 1124-1128, as to *place* of delivery.

⁴ *Van Valkenburgh v. Gregg* (1895), 45 Neb. 654, 63 N. W. R. 949.

nothing more is necessary here than to call attention to their nature as conditions.

§ 1218. Difference in legal effect between condition and warranty.—The distinction in legal effect between a condition precedent and a warranty is important. The non-performance of the condition, unless it be waived, prevents the buyer's liability from attaching; it justifies him in rejecting the goods, repudiating the contract and treating it as at an end. The breach of a warranty, however, as will be seen in the following chapter, has no such effect. The buyer's liability attaches, he may not usually reject the goods or rescind the contract, and he must find his remedy in an action for damages for the injury caused him by the breach.

§ 1219. Condition precedent becoming warranty after acceptance.—But may this condition precedent have any other effect than to give the buyer the right of rejection? Supposing that the goods when tendered by the seller are obviously not such as the contract contemplated, if the buyer accepts them does he thereby waive any right of recovery or recoupment because of such defects? Supposing that the goods when tendered are apparently in conformity to the contract and the buyer accepts them only to discover later that they are subject to latent defects not discoverable by ordinary examination—has he now any remedy? As will be seen in a later chapter¹ in which this subject is fully discussed, there is much difference of opinion.

§ 1220. —. It is held in certain cases that as to all defects at least which were discoverable upon examination, the buyer, in the absence of fraud, is conclusively estopped by his acceptance, and can afterwards neither reject the goods nor recover upon any surviving warranty.² By other cases, however, it is held that the buyer's acceptance even as to discoverable defects

¹ *Post*, ch. VII, on Acceptance by the Buyer, § 1363 *et seq.*

² See these cases fully collected, *post*, § 1391 *et seq.*

is not necessarily conclusive, and, unless it is clear from the circumstances that the buyer intended to waive the defects, the former condition "survives," as it is said, as an implied warranty, which, while not justifying rescission, will sustain a claim for the damages which the buyer has sustained by reason of the defect.¹

The weight of authority, as will be seen, seems to be with the latter view.

¹See these cases fully set forth in § 1392, *post*.

CHAPTER V.

OF WARRANTY BY THE SELLER.

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§ 1221. **Purpose of this chapter.**—It is the duty of the seller not only to perform his chief undertakings to transfer the title and to comply with the conditions upon which the contract is based, but also to perform whatever incidental or collateral undertakings are incident to that principal one. The most important of these collateral undertakings is the agreement of warranty. Taken together, this principal and this

collateral undertaking constitute the contract between the parties. The contract therefore contains two stipulations: 1. The agreement to transfer the title. 2. The collateral but annexed agreement of warranty. The performance of the former stipulation has already been considered; the latter forms the subject of this chapter.

Under this head there will be a treatment —

- I. Of warranties in general.
- II. Of express warranties.
- III. Of implied warranties.

I.

OF WARRANTY IN GENERAL.

§ 1222. **Warranty defined.**—Warranty is an express or implied agreement, collateral but annexed to the agreement to transfer the title, by which the seller undertakes to vouch for the title, quality or condition of the thing sold. Like the agreement to sell, the agreement to warrant may be either executory or executed, and in connection with that contract may assume any of the following forms: 1. I will (hereafter) sell, and I will (hereafter) warrant. 2. I will (hereafter) sell, and I do (now) warrant.¹ 3. I do (now) sell, and I will (hereafter) warrant. 4. I do (now) sell, and I do (now) warrant.

§ 1223. **Is a collateral agreement.**—Warranty is an ancillary and not a principal contract. Correctly speaking, therefore, there can be no warranty where there is no contract to

¹It is, indeed, said in *Osborn v. Metzger* (1890), 118 N. Y. 260, 23 N. E. R. 372, 16 Am. St. R. 753, it is said that “when there is an express warranty, it is unimportant whether the sale be regarded as executory or *in presenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory as in a present sale. *Day v. Pool*, 52 N. Y. 416, 11 Am. R. 719; *Parks v. Morris Ax Co.*, 54 N. Y. 586; *Dounce v. Dow*, 57 N. Y. 16; *Brigg v. Hilton*, 99 N. Y. 517,” 3 N. E. R. 51.

sell.¹ It follows also that whatever defeats or determines the contract to sell must also terminate the contract of warranty.

¹The recent case of *Cameron v. Mount* (1893), 86 Wis. 477, 56 N. W. R. 1094, 22 L. R. A. 512, is an interesting one, in the conclusion of which all would agree, but as to its reasoning there must be room for doubt. It appeared that plaintiff's husband desired to buy a horse for her use. Hearing of this, defendant called upon Mr. Cameron with a horse to sell which he represented to be kind and gentle, and suitable for a woman to drive. Mr. Cameron called his wife to come and look at the horse, which she did, whereupon defendant repeated his representations and invited Mrs. Cameron to get into the buggy and drive the horse on trial. She did so, and, while so driving, the horse viciously kicked and reared, upsetting the buggy, throwing Mrs. Cameron out and seriously injuring her. She brought an action for damages against Mount, though what kind of an action it was, it seemed difficult to determine. There was no allegation in the complaint that defendant knew his representations to be untrue. Plaintiff had a verdict, which the trial court set aside and plaintiff appealed. Said the court, per Orton, J.: "There was no *scienter* alleged in the complaint. The learned counsel seem to be of the opinion that this deficiency of the complaint was the real ground for the granting of a new trial. The jury found specially that the defendant knew that the representations and warranty were false, but it is conceded that there was no evidence to sustain such a finding. The learned counsel of the appellant contend that this was not a good ground for ordering a new trial of the action, and, on the other hand, the learned counsel of the respondent contend that this reason was not only sufficient for ordering a new trial, but that the plaintiff cannot recover without such an averment and proof of a *scienter*. There seemed to be great doubt on the trial, as well as here, whether the action is in tort or on contract. We are inclined to hold that such an averment and proof are not necessary to sustain the action, and that the action is in tort. The representations and warranty set out in the complaint are not strictly and technically a 'warranty,' as in sales of personal property. If they were, no one would contend that it would be necessary to prove that the defendant knew that the facts or conditions embraced therein did not exist or were not true, and the action would be on contract. On such a warranty the law is well settled; but, nevertheless, they do constitute a warranty of the facts and conditions embraced therein as effectually, and are an assurance and engagement just as positive and absolute, as a technical warranty. To sustain an action on such a warranty there is no more necessity of proof that the defendant knew that his statement was false than in the other case of a warranty. The action on a warranty in the sale of personal property is on contract. The action on a warranty relating to other matters or transactions is in tort, and the warranty is a constructive fraud, like a false representation. The learned counsel of the respondent

In respect of warranties of quality, it would seem to follow that no recovery of general damages, *i. e.*, the difference be-

contents that no warranty, as such, can exist except in relation to sales. To show that a warranty may exist in its strictness so far as to dispense with proof that defendant knew its falsity with respect to other matters than sales, and to illustrate the principle, the case of *Kuehn v. Wilson*, 13 Wis. 104, may be referred to. The defendant, as a farrier, treated the plaintiff's colt, and 'warranted the colt would get well and do well,' and it died within a short time thereafter without any fault of the plaintiff. Mr. Justice Cole said in the opinion: 'An express warranty that the colt would get well would be an absolute engagement to make good the loss if the colt died. The warrantor would take the chances and hazards,' etc. Here there is a warranty that the horse was perfectly safe and well calculated for a lady to drive, and that he was kind and gentle, and had no tricks or bad habits, and the same 'absolute engagement to make good the loss' or damage if the horse was not perfectly safe and well calculated for a lady to drive, and 'the warrantor took the chances and hazards' of the experiment. Such warranties constitute a class of frauds, exceptional to the common cases of mere false representations, where an intent to defraud and a knowledge that they were false must be proved. It is an absolute and unconditional engagement to make good the loss.

"The following is a terse and yet comprehensive statement of the law governing this kind of warranty, taken from *Gregory v. Schoenell*, 55 Ind. 101 [this quotation, however, is

not made from *Gregory v. Schoenell*, but from *Stimson v. Helps*, 9 Colo. 33.—F. R. M.], found in a note to 8 Amer. & Eng. Enc. Law, 793: 'The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false and the other party, relying upon them, has been misled to his injury. In such a case the law holds a party bound to know the truth of his representations.' 'Whoever pretends to positive knowledge of a particular fact when he does not know it, and represents such fact to be true, in order that another may rely upon it and act upon it, and does rely and act upon it, and damages flow from the false representation, the person making it is guilty of wilful deception and fraud.' 'If he affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud.' 'If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it is done to procure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he asserts.' 'A reckless statement, made without caring whether it is true or false, is actionable.' 'In such cases it is not necessary to prove that the defendant knew that the representation was not true.' These

tween the value of the goods as warranted and as actually supplied, can be had when the title to the goods never passes.¹

extracts are taken from the following cases, in which it is held that it is immaterial whether the defendant knew the falsity of the express and positive statement which he has made, and upon which another has relied and acted to his injury: *Taylor v. Ashton*, 11 Mees. & W. 401; *Smout v. Ilbery*, 10 Mees. & W. 1; *Pawson v. Watson*, Cowp. 785; *Pulsford v. Richards*, 17 Beav. 87; *Haycraft v. Creasy*, 2 East, 92; *Evans v. Edmonds*, 13 C. B. 777; *Burrowes v. Lock*, 10 Ves. 470; *Pasley v. Freeman*, 3 Term R. 51; *Milne v. Marwood*, 15 C. B. 778; *Add. Torts*, 738, 739. It has been the doctrine of the English courts a long time that when the representation is so positive and absolute as to have the force of an express warranty it is immaterial whether the defendant knew it to be false or not. The representations and warranty in this case have all the accompanying ingredients to make it an actionable fraud. The defendant invited and induced the plaintiff to drive the horse, and she did so, relying upon his representation and warranty that it was perfectly safe for her to do so, and his other assurances of the gentle character of the animal. The defendant was interested in inducing the plaintiff to drive the horse, so that, if it should happen in this instance that the horse should not exhibit any of his unruly and dangerous habits, he might sell him to the plaintiff's husband; and the plaintiff was also interested in the trial, so that she might have a gentle and safe horse to drive. The defendant assumed all the risks and hazards of the trial,

and the plaintiff staked her personal safety on the truth of his representations and warranty, and her severe and permanent injuries were the proximate consequences. This is a very strong case for the application of the principle of the law of warranty. The defendant made his statements as his own actual knowledge, and the plaintiff had no knowledge of the horse or his habits. There is nothing wanting in the case to make the defendant liable, according to the authorities, if the complaint is sustained by the evidence. The case should be tried on the true theory of what the action is, and on a correct view of the law that governs it; and there seems to have been great doubt upon the subject at the former trial."

¹ It is true that it is said in *Dike v. Reitlinger*, 23 Hun (N. Y.), 241, that "an express warranty is collateral to the principal contract, and the rule is well settled that the buyer may reject the goods and sue for damages for a breach of the warranty;" but it is believed that this dictum is not sound. See *Osborn v. Gantz*, 60 N. Y. 540. *Northwood v. Rennie* (Ontario), 28 C. P. 202, 3 App. R. 37, is sometimes cited as justifying such an action, but it appears from the case that the point was expressly excluded by the agreement of the parties, and in the later case of *Frye v. Milligan*, 10 Ont. 509, it is held that general damages for a breach of warranty of quality cannot be recovered where the title has not passed. See also *Tomlinson v. Morris*, 12 Ont. R. 311. *Perrine v. Serrell*, 30 N. J. L. 454, is not in point.

§ 1224. **Warranty to be distinguished from representation.**—Warranty must be distinguished from representation. Representation is an antecedent statement which is made to induce the entering into the contract, but which is not a term in or element of that contract. Its purpose is accomplished when the contract is made. Warranty, on the other hand, is, by the intention and agreement of the parties, a term in, a part of, or an incident to, that contract, and cannot exist without it.¹ A false representation may, as has been seen,² justify the rescission of the contract made in reliance upon it, or may give rise to an action for damages.³ False representation, however, is entirely different in its nature from a breach of warranty.

§ 1225. — **Illustration of distinction.**—This distinction is well illustrated in an English case⁴ in which it appeared that defendant had sent a horse to a sale stable for sale. On the

1 "A warranty," says the court in Pennsylvania, "although a collateral contract, must form part of the transaction involving the sale." *Hexter v. Bast*, 125 Pa. St. 52, 17 Atl. R. 252, 11 Am. St. R. 874. "A warranty," says Lord Abinger, "is an express or implied statement of something which the party undertakes shall be part of a contract, and, though part of the contract, yet collateral to the express object of it." *Chanter v. Hopkins*, 4 Mees. & Wels. 404.

² See *ante*, § 866 *et seq.*

³ See *post*, § 1666.

⁴ *Hopkins v. Tanqueray* (1854), 15 Com. B. 130, 80 Eng. Com. L. 129. (Compare with *Bannerman v. White*, 10 C. B., N. S., 844. quoted *ante*, § 863.) This case is followed in *Craig v. Miller* (1872), 22 U. C. C. P. 348. In *Zimmerman v. Morrow* (1881), 28 Minn. 367, 10 N. W. R. 139, the plaintiff brought an action upon an alleged warranty of a span of horses. The

complaint alleged "that before this plaintiff bought said horses the defendant told him, the plaintiff, that nothing ailed said horses but a cold," etc. It did not appear how long before or under what circumstances the seller made this assertion. No deceit was alleged. *Held*, that the complaint stated no cause of action. "The fact alleged," said the court, "that plaintiff was led to purchase the horses by the representation does not alter the case; for, there being no fraud, he had no right to rely upon it in making the purchase unless it was made in such a manner and under such circumstances as gave him the right to understand that the defendant intended to be bound by it as part of the contract of sale." In *Torkelson v. Jorgenson* (1881), 28 Minn. 383, 10 N. W. R. 416, the same court say that, "if representations be relied on to make out the warranty, they must be made in

day before the sale defendant observed the plaintiff kneeling down and examining the horse's legs, whereupon the defendant assured the plaintiff that he need not examine as the horse was perfectly sound in every respect. The plaintiff therefore desisted from the examination, saying that he was satisfied with the defendant's assurance. The following day the horse was put up for sale without a warranty, and plaintiff bought him in reliance, as he said, upon the defendant's representation. The horse proved to be unsound and this action was brought. It was held that the statement of defendant did not constitute a warranty, but amounted to a representation only, and that as it appeared that the defendant acted in good faith, believing the horse to be sound, the plaintiff could not recover.

§ 1226. — "A representation," said Crowder, J., in that case, "to constitute a warranty must be shown to have been intended to form part of the contract. I think it abundantly clear upon the evidence that the matter here relied on was not understood or intended as forming part of the contract which might be made at the auction on the following day, which it was well known to both parties would be without a warranty. It was a mere representation, quite distinct from any intention to warrant the animal."

§ 1227. — **Further illustration.**— On the other hand, in a substantially similar case¹ recently arising in Vermont, the facts were that plaintiff inquired of defendant concerning a horse which he had advertised to be sold at auction, and received assurances as to the age and soundness of the horse, which, she was told, could not be sold at private sale but must be sold at the auction, when she could attend and bid. Relying upon these assurances she bought the horse at the auction sale.

such manner and circumstances as to authorize the vendee to understand that the vendor intended to be bound by them as a part of the contract of sale, and he must accordingly have purchased in reliance upon them." See also *James v. Bocage* (1885), 45 Ark. 284; *Holmes v. Tyson* (1892), 147 Pa. St. 305, 23 Atl. R. 564, 15 L. R. A. 209.

¹ *Crossman v. Johnson* (1891), 63 Vt. 333, 22 Atl. R. 608, 13 L. R. A. 678.

The horse proved to be unsound, and there was evidence tending to show that the defendant knew it when he made the representations. Plaintiff sought to recover upon a warranty and also on the ground of fraud, and was permitted to do so. The court based its conclusions upon the ground of an express warranty made pending the treaty of sale by an affirmation of quality upon which the plaintiff was entitled to rely. The distinction between representation and warranty was not referred to, though the facts were such as would undoubtedly have sustained a recovery upon the ground of a false representation.

§ 1228. — Not to be confused with time of warranting. The question is not to be confounded with that of the time when a warranty may be made, for, as will be seen,¹ the statement which constitutes the warranty may be made at the very beginning of the negotiation and at a considerable period before the contract is closed: the material question is, not when the representation was made, but whether it was designed by the parties to be a term in the contract.

§ 1229. — How determined.—The determination whether a given statement is a representation or a warranty is usually a question for the jury, though it may be decided by the court if the facts are not in dispute.²

§ 1230. — How affected by usage.—If, under the rules of law, the statement is merely a representation, a local and special usage cannot convert it into a warranty.³

§ 1231. Warranty to be distinguished from condition.—Warranty is also to be distinguished from condition. Condition is a statement or promise which forms the basis of the contract, and a breach of it entitles the party relying upon it to treat

¹ See *post*, §§ 1235, 1240.

² *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59, 34 Am. Dec. 108; *Bradford v. Bush*, 10 Ala. 386; *House v. Fort*, 4 Blackf. (Ind.) 293; *Baum v. Stevens*, 2 Ired. (N. C.) 411; *Foggart v. Black-*

weller, 4 id. 238; *Morrill v. Wallace*, 9 N. H. 111.

³ *Wetherill v. Neilson* (1853), 20 Pa. St. 448, 59 Am. Dec. 741, overruling *Snowden v. Warder*, 3 Rawle (Pa.), 101.

the contract as at an end.¹ Warranty, on the other hand, is, as has been seen, a collateral or subsidiary promise, the breach of which does not ordinarily terminate the contract, but gives rise merely to an action for damages.

In practice, however, the distinction between warranty and condition, though clear enough when attended to, is frequently lost sight of, and, especially in the field of implied warranty, many elements of the contract which are really conditions are commonly designated warranties which the law implies.² The practice leads to confusion, and has been often deprecated, but it seems to be too firmly rooted for extermination.

§ 1232. Warranty absolute or conditional.—A warranty may be either absolute or conditional. It is usually the former, but there is no legal objection to making its operation and effect dependent upon a contingency or condition; and if this is done the warranty will be available only in the event specified.³ A common example of the conditional warranty is that found in many contracts for the sale of agricultural implements—a subject hereafter more fully to be considered.⁴

§ 1233. Classification of warranties.—Warranties are usually classified as *express* or *implied*; the former being those which the seller makes in terms, while the latter are those which the law implies from the nature or circumstances of the case. The most important of those which are said to be implied by law are warranties of title, quality, fitness, and genuineness.

The subject will be considered in accordance with this classification.

II.

EXPRESS WARRANTIES.

§ 1234. Express warranty defined.—An express warranty, in the sense in which those words are here used, is to be dis-

¹ See *ante*, § 1218.

Iowa, 477, and cases cited in §§ 1383, 1384, *post*.

² See *post*, § 1295 *et seq*.

³ See *Bomberger v. Griener*, 18

⁴ See § 1383, *post*.

tinguished from the warranties implied by law and hereafter to be considered.¹ The latter are obligations arising largely from mere implication of law; the former is one which arises from the declarations and conduct of the parties.

An express warranty, therefore, is a direct and positive affirmation or assertion made by the seller, as part of the contract of sale, relating to some matter of fact respecting the title, quality, character or condition of the thing sold, under such circumstances that it may fairly be regarded by the buyer as a promise or undertaking on the part of the seller that the fact is as he so affirms or asserts, and which the buyer relies upon as such in making the purchase.²

§ 1235. What constitutes a warranty — Any direct and positive affirmation.— In order to constitute an express warranty no particular language is necessary. It is not required that it shall be in writing, or be made in specific terms; and it is not at all necessary that the word “warrant” or “warranty” shall be used.³ Any direct and positive affirmation of a matter of fact, as distinguished from a mere matter of opinion or judgment, made by the seller during the treaty of sale and as a part of the contract, designed by him to induce the action of the purchaser and actually, to some extent at least, relied upon by the latter in making the purchase,⁴ will be deemed to

¹ See *post*, § 1295.

² See the cases cited in the following sections.

³ *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. R. 372, 16 Am. St. R. 753; *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488, 26 N. W. R. 762; *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. R. 342; *Callanan v. Brown*, 31 Iowa, 333; *Jack v. Railroad Co.*, 53 Iowa, 399, 5 N. W. R. 537; *Reed v. Hastings*, 61 Ill. 266; *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; *Warren v. Philadelphia Coal Co.*, 83 Pa. St. 437; *Osgood v. Lewis*, 2 H. & G. (Md.) 495, 18 Am. Dec. 317; *Ers-*

kine v. Swanson (1895), 45 Neb. 767, 64 N. W. R. 216; *Money v. Fisher* (1895), 92 Hun (N. Y.), 347; *Robinson v. Harvey* (1876), 82 Ill. 58; *Polhemus v. Heiman* (1873), 45 Cal. 573; *Austin v. Nickerson* (1867), 21 Wis. 549.

⁴ **Reliance upon the warranty** is indispensable to a recovery upon it. *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. R. 356 [citing *Tewkesbury v. Bennett*, 31 Iowa, 181; *Jackson v. Mott*, 76 Iowa, 265, 41 N. W. R. 12; *McDonald Mfg. Co. v. Thomas*, 53 Iowa, 560, 5 N. W. R. 737; *Figge v. Hill*, 61 Iowa, 430, 16 N. W. R. 339]; *Deyo v. Ham-*

be a warranty.¹ Following this principle more fully into details, it may be noticed that —

§ 1236. —. Direct assertions or positive representations as to title, quality or condition, express stipulations concerning the description of the goods, explicit declarations that the negotiations are conditioned upon the existence of given attributes, capacities or characteristics,² and the like, are a few of

mond (1894), 102 Mich. 122, 60 N. W. R. 455; though it need not constitute the sole reliance. *Shordan v. Kyler* (1882), 87 Ind. 38. Plaintiff need not testify directly that he relied upon it; whether he did so or not is a question for the jury. *Way v. Martin*, 140 Pa. St. 499, 21 Atl. R. 428; *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584; *Dake Engine Mfg. Co. v. Hurley*, 99 Mich. 16, 57 N. W. R. 1044.

¹ *Fairbank Canning Co. v. Metzger*, *supra*; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. R. 595; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. R. 100, 6 Am. St. R. 122; *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. R. 687; *Polhemus v. Heinman*, 45 Cal. 573; *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. R. 840; *Horton v. Green*, 66 N. C. 596; *Lewis v. Rountree*, 78 N. C. 323; *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. R. 652; *Barnes v. Burns*, 81 Wis. 232, 51 N. W. R. 419; *White v. Stelloh*, 74 Wis. 435, 43 N. W. R. 99; *Neave v. Arntz*, 56 Wis. 174, 14 N. W. R. 41; *Smith v. Justice*, 13 Wis. 600; *Hahn v. Doolittle*, 18 Wis. 196, 86 Am. Dec. 757; *Austin v. Nickerson*, 21 Wis. 542; *Giffert v. West*, 33 Wis. 617; *Elkins v. Kenyon*, 34 Wis. 93; *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; *Chapman v. Murch*, 19 Johns. (N. Y.), 290, 10 Am. Dec. 227; *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266; *Mason v. Chappell*, 15 Gratt. (Va.) 572; *Randall v. Thornton*,

43 Me. 226, 69 Am. Dec. 56; *Lamme v. Gregg*, 1 Metc. (Ky.) 444, 71 Am. Dec. 489; *Osgood v. Lewis*, 2 H. & G. (Md.) 495, 18 Am. Dec. 317; *Shippen v. Bowen*, 122 U. S. 575, 30 L. ed. 1172; *Weimer v. Clement*, 37 Pa. St. 147; *Murphy v. Gay*, 37 Mo. 535; *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Reese v. Bates* (1897), 94 Va. 321, 26 S. E. R. 865; *Burr v. Redhead, etc. Co.* (1897), 52 Neb. 617, 72 N. W. R. 1058; *McClintock v. Emick* (1888), 87 Ky. 160, 7 S. W. R. 903; *Herron v. Dibrell* (1891), 87 Va. 289, 12 S. E. R. 674; *Hobart v. Young*, 63 Vt. 363, 21 Atl. R. 612, 12 L. R. A. 693.

² It will be found in later sections (*post*, § 1333) that the description of the goods may raise an *implied* warranty of conformity; but there can be no question that conformity to description may also become the matter of an express warranty. Thus in *Groetzinger v. Kann*, 165 Pa. St. 578, 30 Atl. R. 1043, 44 Am. St. R. 676, sellers wrote to buyers offering to sell leather, and saying "Our leather is now thoroughly tanned." Buyers replied: "If your leather is thoroughly tanned now, and all right in other respects, we will take," etc. *Held* to amount to an express warranty that the leather was thoroughly tanned. (The court cited and relied upon *Philadelphia Iron Co. v. Hoffman*, — Pa. St. —, 4 Atl. R. 848, where a stipulation for sale and

the many illustrations furnished by the cases of the affirmations constituting express warranties within the foregoing rule.

§ 1237. Intention to warrant.—It is not necessary, according to the clear weight of authority, that the seller shall actually have intended his representation to be a warranty.¹ If he

delivery of iron "strictly neutral" was held an express warranty; and *Halloway v. Jacoby*, 120 Pa. St. 583, 15 Atl. R. 487, 6 Am. St. R. 737, where an order was given for corn, "provided it is good, salable corn," and the order was accepted generally, and it was held that there was a warranty that it was corn of the kind described; and *Holt v. Pie*, 120 Pa. St. 425, 14 Atl. R. 389; and *Pratt v. Paules*, — Pa. St. —, 4 Atl. R. 751, where an order which was accepted specified that the goods should be of a certain quality, and it was held that there was an express warranty that they were of that quality.)

Many other cases hold, and rightly, that direct and positive assertions concerning the description of the article, and also words of description in bills of sale, bills of parcels, broker's notes, and the like, constitute express warranties that the goods conform to the description. *Osgood v. Lewis*, 2 H. & G. (Md.) 495, 18 Am. Dec. 317, where a statement in a bill of parcels of a quantity of oil that it was "winter-pressed sperm oil" was held an express warranty that such oil was winter pressed; and in *Yates v. Pym*, 6 Taunt. 446, the description in a sale note of the goods as "prime singed bacon" was held an express warranty that it was such; and *Shepherd v. Kain*, 5 B. & Ald. 240, where a statement in an advertisement of a ship that she was "copper-fastened" was held to amount to an ex-

press warranty that she was so; and in *Love v. Miller*, 104 N. C. 582, 10 S. E. R. 685, where there was a sale of cotton "to be of the average grade of middling," it was held that this was a warranty that the cotton was of such grade *in fact* and not merely that it was so according to any particular method of inspection.

¹ There are, it is true, many cases which hold, or at least assert, that the seller's representations cannot be deemed to be a warranty unless he intended that they should be so considered, or, as it is put in *Pennsylvania* by Chief Justice Gibson (in *McFarland v. Newman* (1839), 9 Watts (Pa.), 55, 34 Am. Dec. 497), unless the jury are "satisfied from the whole that the vendor actually and not constructively consented to be bound for the truth of his representation." This idea seems to have been continued in the *Pennsylvania* cases. Thus in *Hexter v. Bast* (1889), 125 Pa. St. 52, 17 Atl. R. 252, 11 Am. St. R. 874, it is said of a warranty that "no special form of words is necessary to create it; an affirmation at the time of the sale is sufficient, provided it was so intended."

The same view prevailed at an early day in *Vermont*, but this view has been subsequently modified. Thus in *Enger v. Dawley* (1890), 62 Vt. 164, 19 Atl. R. 478, it is said: "To constitute a representation a warranty, it must have been so intended and understood by the parties, both

uses language which in law amounts to a warranty, and the buyer relies on it as such, the seller cannot escape responsibility upon the ground that he had no intention to warrant. What the buyer reasonably understood rather than what the seller actually intended must usually be the important inquiry.¹

vendor and vendee (*Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571; *Foster v. Caldwell*, 18 Vt. 176; *Bond v. Clark*, 35 Vt. 577; *Houghton v. Carpenter*, 40 Vt. 588; *Pennock v. Stygles*, 54 Vt. 226); or intended by the parties as a *part of the contract* (*Richardson v. Grandy*, 49 Vt. 22); or have formed the basis of the contract (*Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. R. 100, 6 Am. St. R. 122)."

Similar views have been announced in **Illinois**. *Ender v. Scott*, 11 Ill. 35; *Adams v. Johnson*, 15 Ill. 345; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Hanson v. Busse*, 45 Ill. 496. But that the court in Illinois is in accord with the rule generally prevailing is shown by such cases as *Reed v. Hastings*, 61 Ill. 266.

And in **Indiana**. *House v. Fort*, 4 Blackf. 293, where it is said: "There was no warranty *in terms*; and if by the language used a warranty was intended, that intention was to be proved."

And in **North Carolina**. *Erwin v. Maxwell*, 3 Murphey, 241, 9 Am. Dec. 602; *Ayres v. Parks*, 3 Hawks, 59; *Foggart v. Blackweller*, 4 Ired. 238; but compare with *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. R. 840.

There are expressions to the same effect in *Bagley v. Rolling Mill*, 21 Fed R. 159.

¹Notwithstanding the rule laid down in the cases referred to in the preceding note, there can be no doubt, as is pointed out by Dewey, J.,

in *Stone v. Denny*, 4 Metc. (Mass.) 151, that "the courts have in their later decisions manifested a strong disposition to construe liberally in favor of the vendee the language used by the vendor in making any affirmation as to his goods, and have been disposed to treat such affirmations as warranties whenever the language would reasonably authorize the inference that the *vendee* so understood it."

In *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. R. 595, Earl, J., says: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so, if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it, and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee." To same effect: *Fair-*

§ 1238. — **How determined.**— If the contract is in writing, or, though in parol, if the facts are not disputed, the question whether the language used amounts to a warranty is usually to be determined by the court;¹ but where the contract rests in parol and the facts are in dispute or the language is ambiguous, it becomes a question for the jury to determine whether there was a direct and positive affirmation of a matter of fact as part of the contract, and whether the buyer was induced to purchase by his reliance upon it.²

§ 1239. — **Motive — Good faith no defense.**— So that the seller made the representation in entire good faith, believing it to be true, is no defense. His good or bad faith may be material where the right to rescind or maintain an action for deceit is the point in issue, but the seller is none the less liable upon his warranty because he honestly believed the fact to be as stated. As said in a recent case:³ “A warranty in a sale of chattel property is a part of the contract; and the warrantor is bound by it, and answerable in damages for its breach, though he may have honestly believed the article to be as warranted. But the representations of the seller may fall short of an express warranty, and yet may be such as to induce the purchaser to rely upon them, and entitle him to redress against the seller if the latter knew they were false, or recklessly made them without reasonable ground for believing them to be true.”

bank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. R. 372, 16 Am. St. R. 753; M'Clintock v. Emick, 87 Ky. 160, 7 S. W. R. 903; Neave v. Arntz, 56 Wis. 174, 14 N. W. R. 41; Stroud v. Pierce, 6 Allen (Mass.), 413; Robinson v. Harvey, 82 Ill. 58; Dounce v. Dow, 64 N. Y. 411; Van Wyck v. Allen, 69 N. Y. 61; Smith v. Justice, 13 Wis. 600; Huntington v. Lombard (1900), — Wash. —, 60 Pac. R. 414; Erskine v. Swanson (1895), 45 Neb. 767, 64 N. W. R. 216.

Horner v. Parkhurst, 71 Md. 110, 17 Atl. R. 1027.

²Hawkins v. Pemberton, *supra*; Jackson v. Mott, 76 Iowa, 263, 41 N. W. R. 12; McGrew v. Forsythe, 31 Iowa, 179; Figge v. Hill, 61 Iowa, 430, 16 N. W. R. 339; Osgood v. Lewis, 2 H. & G. (Md.) 495, 18 Am. Dec. 317; Horner v. Parkhurst, 71 Md. 110, 17 Atl. R. 1027; Erskine v. Swanson (1895), 45 Neb. 767, 64 N. W. R. 216.

³Gartner v. Corwine (1897), 57 Ohio St. 246, 48 N. E. R. 945.

¹Hawkins v. Pemberton, *supra*;

§ 1240. Reference to other warranties or to printed statements — Warranty by conduct.— The affirmation which may be deemed to be a warranty need not be made in express words. It may be made by conduct,¹ and the language used on other occasions, in previous dealings,² or in circulars, advertisements or testimonials, may be adopted and incorporated into the contract with the same result as if it had then been declared in express terms for the purposes of that particular contract.³ The

¹ In *Horton v. Green* (1872), 66 N. C. 596, it is said: "Of necessity, in verbal contracts, says Chief Justice Ruffin, a greater latitude must be allowed to evidence to establish the words and the meaning of parties. The evidence may consist of everything which tends to establish that the vendor meant to convey the impression that he was binding himself for the soundness of the article, and that the vendee relied on what was passing as a stipulation.' Among these circumstances, even the tones, looks, gestures and the whole manner of the transaction, with all the surroundings, would be competent evidence for the jury to consider in making up their verdict." In *Baum v. Stevens* (1842), 2 Ired. (N. C.) 411, the controversy was whether there was a warranty of soundness of a slave named Jim. Several slaves were sold at auction, and when the one prior to Jim was offered, the seller said that he did not warrant *that* negro, as he was unsound, but when Jim was offered he said: "Here is a young, likely, healthy negro; what is bid for him?" *Held* to be a question for the jury whether this language and conduct did not amount to a warranty of soundness.

In *Ingraham v. Union R. Co.* (1896), 19 R. I. 356, 33 Atl. R. 875, where horses were being sold by auction,

and a general statement was made that, if any horse offered was unfit for single driving, it would be mentioned, it was held that a sale of a horse without stating the contrary carried with it by implication a warranty that it was fit for single driving.

² Where goods of a given kind have previously been sold and the buyer orders more, there is an implied warranty that they shall be of the same kind as those formerly sold. *Bagley v. Rolling Mills*, 21 Fed. R. 159.

³ That the language of circulars, and the like, describing the goods, may be so referred to as to constitute part of the contract, see *Phelps v. Whitaker*, 37 Mich. 72; *Palmer v. Roath* (1891), 86 Mich. 602, 49 N. W. R. 590; *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. R. 342; *Robson v. Miller*, 12 S. C. 586, 32 Am. R. 518; *Snow v. Shomacker Mfg. Co.*, 69 Ala. 111, 44 Am. R. 509; *Power v. Barham*, 4 Ad. & El. 473, 31 Eng. Com. L. 114; *Ormsby v. Budd*, 72 Iowa, 80, 33 N. W. R. 457; *Boothby v. Scales*, 27 Wis. 626; *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714, 19 S. E. R. 846; *Landman v. Bloomer* (1898), 117 Ala. 312, 23 S. R. 75. But it must actually enter into the contract. *Enger v. Dawley*, 62 Vt. 164, 19 Atl. R. 478. And the mere showing of testimonials is not enough

material inquiry in such cases is whether it has been so adopted, for it is not alone enough that such previous dealings, or such circulars, advertisements or testimonials, be referred to — they must expressly or impliedly have been made a part of the contract.¹ Whether they have or not will be for the court to determine where the negotiations are in writing or undisputed, but otherwise for the jury.

to amount to a warranty in accordance with their statements in the absence of any evidence that the seller adopted their language as his own. *Richey v. Daemicke*, 86 Mich. 647, 49 N. W. R. 516.

Warranty may be made by referring to a warranty contained in separate written instrument, but it will be an oral warranty. *Aultman v. Shelton*, 90 Iowa, 288, 57 N. W. R. 857.

In *Grieb v. Cole* (1886), 60 Mich. 397, 27 N. W. R. 579, 1 Am. St. R. 533, it appeared that the plaintiff, Grieb, who was an implement dealer, had a general printed form of order which could be used for any kind of an implement, blanks being left for inserting the names, terms and description of the implement. On the back of the order was a printed warranty having blanks in it for the insertion of the buyer's name and the kind of implement, but evidently referring to the machine which might be ordered on the other side. The order form also referred to "the warranty hereon indorsed." This warranty had Grieb's name printed at its foot. Cole ordered of Grieb a mowing machine, and the order was properly filled in upon one of these order blanks, but the blanks in the warranty on the back of the order were left unfilled. In an action to recover the price, the defendant objected to the introduction of the order and

warranty on the ground that they were imperfect and incomplete instruments, but the court held that the order and the warranty so evidently referred to each other that the order supplied the facts to which the warranty applied and made it valid, though if standing alone it would have been insufficient. It was also held that the plaintiff by his use of the printed forms had made the printed signature his own.

In *De Witt v. Berry* (1889), 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. R. 536, it appeared that by the terms of the contract of sale the goods were to be "exactly the same quality as we make for the DeWitt Wire Cloth Company." The buyers insisted that this made the contract with the latter company a standard of quality, but the court said that the language used did not mean that the goods should be "exactly the same quality as we have *contracted* to make for the De Witt Co.," but simply of "exactly the same quality as we *make* for the De Witt Co.," and therefore excluded reference to that contract.

¹ Where a contract of sale upon a certain warranty fails, and the buyer then makes a new proposition in writing, silent as to warranty, which is accepted, the warranty in the previous contract is not incorporated. *Byrd v. Campbell Printing Press Co.*, 90 Ga. 542, 16 S. E. R. 267.

§ 1241. — **Mere expression of judgment or opinion not a warranty.**— But while positive affirmations of matters of fact will, as has been seen, constitute a warranty, this is not ordinarily true of expressions of mere matters of opinion or judgment. For it is certain that an honest expression of his opinion or judgment as such imposes no liability upon the seller, though it prove to have been unfounded or mistaken;¹ but an expression of an opinion or judgment which he does not honestly entertain will make the seller liable as for deceit or breach of warranty.²

§ 1242. — **What questions presented.**— The difficulty which arises in the application of this principle is in determining what representations are expressions of opinion or judgment merely and what are affirmations of fact, and the difficulty is increased by the fact that the same representation may, under varying circumstances, fall either under one head or the other. Where the parties stand upon an equal footing, with equal knowledge or means of knowledge, an assertion by the seller presents a different aspect from that presented where the buyer is ignorant or has no means of knowledge and relies upon the opinion or judgment of the seller, whose opportunities for correct information are superior.

In the former case, it may be, as was said by Buller, J., in a leading case,³ “that the assertion was of mere matter of judgment and opinion — of a matter of which the defendant had no particular knowledge, but of which many men will be of

¹ See *ante*, § 871. “Before a party can be held on a contract of warranty, what he states must be something more than an expression of an opinion or the announcement of his judgment. It must contain a promise, express or implied, in addition thereto, to make good the opinion or judgment thus expressed.” *Linn v. Gunn*, 56 Mich. 447, 23 N. W. R. 84.

v. Smith, 5 M. & Ry. 124, the seller of a horse refused to warrant it, but asserted that it was “sound to the best of his knowledge.” He actually knew that the horse was unsound. It was held that there was a qualified warranty and that the seller was liable for the breach of it. Compare *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. R. 5, cited in a later note.

³ *Pasley v. Freeman*, 3 T. R. 51, 1

² Thus, in the oft cited case of *Wood* Rev. R. 634.

many minds, and which is often governed by whim and caprice. Judgment or opinion, in such case, implies no knowledge.”¹

1 “There is a distinction,” it is said in *Towell v. Gatewood*, 2 Scam. (Ill.) 22, 33 Am. Dec. 437, “as to the legal effect of expressions when used in reference to a matter of fact, and when used to express an impression or opinion. Where the representation is positive and relates to a matter of fact, it constitutes a warranty; as that a ship is an American or French ship, or that the crew consists of so many hands. But where the representation relates to that which is a matter of opinion or fancy, as, for example, the value of a horse or painting, in such cases the representation is to be regarded as an expression of opinion, rather than such a verification of a fact as will amount to a warranty, unless that idea is excluded by an express warranty, or such other declaration as leaves no doubt of the intention to make a warranty.”

In *Jendwine v. Slade* (1797), 2 Esp. 572, there was a sale of paintings thought to be by old masters. Opposite the name of each in the catalogue was put the name of a painter. Plaintiff bought two said to be by Lorraine and Teniers, respectively, and brought an action for damages, alleging that the pictures were copies and not original. Eminent artists and picture dealers, who were called as witnesses, differed in their opinions respecting the originality of the pictures. Lord Kenyon said that “It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the

picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase.” But in *Power v. Barham* (1836), 4 Ad. & El. 473, 31 Eng. Com. L. 114, Lord Denman distinguished *Jendwine v. Slade*, *supra*, on the ground that the painters there mentioned were very old painters (Lorraine died in 1682 and Teniers in 1684), and held that where pictures, said to be by a modern painter, were sold with a bill of parcels containing the words “Four pictures, Views in Venice, Canaletto” (who died in 1768), it was at least a question for the jury whether it was a mere expression of opinion or an affirmation of fact, and the jury having found it to be a warranty their verdict was not disturbed. In *Lomi v. Tucker*, 4 Car. & P. 15, the sale was of two pictures said by the seller to be “a couple of Poussins” (Poussin died in 1665). It was left to the jury to determine whether the buyer bought them believing from the seller’s representations that they were genuine; and if so, he was not bound to take them unless genuine.

Matters of opinion and not warranties.—A statement in a bill of sale of tobacco describing it as “good

But in the latter case a positive affirmation made by the seller for the purpose of inducing the sale, and relied upon by the buyer, will be deemed to be a warranty, even though under

first and second rate tobacco," unaccompanied by any other assurance of quality, is mere matter of opinion and not a warranty. *Towell v. Gatewood*, 2 Scam. (Ill.) 22, 33 Am. Dec. 437.

A statement by a country drover to a New York city stock-buyer that hogs sold to the latter and open to inspection "were suitable and proper for the New York city market" "is but the expression of an opinion upon a subject upon which the purchaser had much the better opportunity of knowledge; and were it otherwise, it would not constitute a warranty in law." *Bartlett v. Hopcock*, 34 N. Y. 118, 88 Am. Dec. 428.

So of a statement that a bond is "an A No. 1 bond," "which we understand to mean simply that it was a first-rate bond or that the railroad was good security for the bonds." *Deming v. Darling* (1889), 148 Mass. 504, 20 N. E. R. 107.

So of a statement that sheep offered for sale "would shear from three to five pounds of wool per head, and that [the buyer] could pay for the sheep, by the wool from the sheep, in two years, and have wool left." *Bryant v. Crosby* (1855), 40 Me. 9.

A statement that canned corn is of the "best packing of 1888" is not a warranty. *Sleeper v. Wood*, 60 Fed. R. 883, 21 U. S. App. 127, 9 C. A. 289.

So a declaration that trees for transplanting have not been injured by the weather. *Baker v. Henderson* (1869), 24 Wis. 509.

A statement that a horse sold after inspection by the buyer would "stand the work the buyer had to do" is, "at most, a mere expression of opinion, and not a representation or affirmation amounting to a warranty." *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. R. 356. But a statement that a horse is a "good worker" may be a warranty. *Toner v. Zell*, 149 Pa. St. 458, 27 Atl. R. 304.

An assertion as to the age of a horse is not necessarily a warranty, and will not be so considered where neither party understood it to be more than a mere representation. *Jackson v. Mott*, 76 Iowa, 263, 41 N. W. R. 12.

A statement in a sale-catalogue of horses that a certain young stallion offered "will attract attention anywhere and make his mark as a foal-getter" is but a mere expression of opinion or prediction, and not a warranty. *Roberts v. Applegate* (1894), 153 Ill. 210, 38 N. E. R. 676.

In *Kircher v. Conrad* (1890), 9 Mont. 191, 23 Pac. R. 74, 18 Am. St. R. 731, 7 L. R. A. 471, it was held, following *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504, that an honest assertion by the seller of wheat that it was spring wheat when in fact it was winter wheat,—the wheat being open to inspection, and, in the latter but not in the former case, both parties having equal means of knowledge,—was not a warranty. But both of these cases are of doubtful authority.

In *Kircher v. Conrad*, *supra*, there was talk about a quantity of wheat.

other circumstances it might be deemed an expression of opinion merely.¹

§ 1243. — **Test for determining.**— The decisive test has been said to be “whether the vendor assumes to assert a *fact*

The buyer said if he knew it was spring wheat he would buy a certain amount. The other said he did not know whether it was spring wheat, but could find out. The buyer requested him to do so. Later the seller said he had learned, “It is spring wheat. We have just got a carload of it.” The buyer said, “Are you sure it is spring wheat,” and the seller replied, “What do you take me for?” *Held*, not to constitute a warranty.

In *Holmes v. Tyson* (1892), 147 Pa. St. 305, 23 Atl. R. 564, 15 L. R. A. 209, there had been previous statements that the horse sold was kind, sound and gentle, but no express warranty to that effect. On the day of the sale, the buyer said, “I have nothing to show that you warrant this horse as you represent him;” to which the seller replied, “the horse is just the same as when you drove him on Monday.” *Held*, not a warranty.

Representations as to value or amount, usually mere matters of opinion where both parties stand on equal footing. *Collins v. Jackson* (1884), 54 Mich. 186; *Poland v. Brownell* (1881), 131 Mass. 138; *Uhler v. Semple* (1869), 20 N. J. Eq. 288. As to their effect as fraud, see *ante*, § 936.

Representations as to the “soundness” of animals and slaves were formerly held to be mere matter of opinion, not warranties unless so *intended* by the seller, and imposing no liability unless knowingly false. *Er-*

win v. Maxwell, 3 Murph. (N. C.) 241, 9 Am. Dec. 602; *McFarland v. Newman*, 9 Watts (Pa.), 55, 84 Am. Dec. 497; *House v. Fort*, 4 Blackf. (Ind.) 293; *Baird v. Matthews*, 6 Dana (Ky.), 129; *Inge v. Bond*, 3 Hawks (N. C.), 101; *Whitney v. Sutton*, 10 Wend. (N. Y.) 411; *Tyre v. Causey*, 4 Harr. (Del.) 425; *Nawkins v. Berry*, 5 Gilm. (Ill.) 36; *Hazard v. Irwin*, 18 Pick. (Mass.) 95. But, as will be seen in section 1268, *post*, the modern rule treats positive affirmations of this nature, by which the sale was induced, as warranties.

Express refusal to warrant.— Where, though the seller makes statements concerning quality, he expressly refuses to warrant, what he says is to be regarded as mere expression of opinion. *Lynch v. Curfman* (1896), 65 Minn. 170, 68 N. W. R. 5. Compare *Wood v. Smith*, 5 M. & Ry. 124, cited *ante*.

¹ Where there was correspondence concerning a ruling machine, which had been described in seller's catalogue as second-hand but in first-class order, and plaintiff, the seller, wrote the buyer that the machine “will certainly do your work,” the court said: “The statements in the letters of plaintiff with reference to it cannot be treated as mere expressions of opinion in regard to a matter concerning which the defendant was required to exercise his own judgment. He had not seen the machine, and relied wholly upon plaintiff's statements in regard to it. That fact

of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to

plaintiff knew, and therefore his statements should be treated as representations of existing facts and a part of the agreement. His letter indicates a knowledge on his part of the work which the machine was expected to do, and there was an implied, if not express, warranty that the machine furnished would do that work. *Blackmore v. Fairbank*, 79 Iowa, 288, 44 N. W. R. 548. It was not necessary that there should be a warranty in specific terms. *Callanan v. Brown*, 31 Iowa, 338; *Jack v. Railroad Co.*, 53 Iowa, 401, 5 N. W. R. 537; *Forcheimer v. Stewart*, 65 Iowa, 598, 22 N. W. R. 886, 54 Am. R. 30; *Copas v. Provision Co.*, 73 Mich. 541, 41 N. W. R. 691; 2 *Sutherland on Damages*, 409. We conclude that the district court was authorized to find that the machine was sold with a warranty that it was in good order and would do good work and the work of defendant." *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. R. 342. So there may be a recovery where a horse proves not to be a "good worker," as warranted. *Toner v. Zell*, 149 Pa. St. 458, 27 Atl. R. 804. Compare with *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. R. 356, cited in preceding note.

Affirmations as to matters of fact, constituting warranties.—An affirmation made at the time of the sale that a jack sold was a good and sure foal-getter is such an affirmation of fact as to constitute a warranty. *Lamme v. Gregg*, 1 Metc. (Ky.) 444, 71 Am. Dec. 489; *Dickens v. Williams*, 2 B. Mon. (Ky.) 374. So

also *Eyers v. Hadden* (1895), 70 Fed. R. 648.

An affirmation that sheep are "young and healthy" is a representation of matter of fact and will constitute a warranty. *Bryant v. Crosby* (1855), 40 Me. 9. And so of an affirmation that horses sold are "sound and kind." *Hobart v. Young* (1891), 63 Vt. 363, 21 Atl. R. 612, 12 L. R. A. 693; and that ewes have not been with the bucks. *Reed v. Hastings* (1871), 61 Ill. 266.

A representation by the manufacturer and seller that a machine "will work well" or "do good work" may constitute a warranty, and it will be broken if the buyer, exercising reasonable care and skill in an honest effort, is unable to make it do good work. *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa, 607, 55 N. W. R. 537; *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa, 556, 53 N. W. R. 310. So a representation that guano sold was "as good as any in the market" is of matter of fact, and a warranty. *Reese v. Bates* (1897), 94 Va. 321, 26 S. E. R. 865. So of a representation by the seller of tobacco, that it was "sound," "redried" and "would certainly keep." *Herron v. Dibrell* (1891), 87 Va. 289, 12 S. E. R. 674.

A representation that a boiler will effect a saving of at least twenty per cent. in fuel over any other horizontal boiler is a warranty and not mere seller's "puffing." *Hazelton Boiler Co. v. Fargo Gas & Electric Co.* (1894), 4 N. Dak. 365, 61 N. W. R. 151.

have an opinion and to exercise his judgment. In the former case there is a warranty, in the latter not."¹

§ 1244. — **Court or jury.**—Whether the representation was made as one of fact, or of opinion merely, is, where the facts are in dispute, a question for the jury to determine;² but where the facts are conceded or the statement is in writing, the question is for the court.³

§ 1245. — **Mere commendation or "seller's praise" not a warranty.**—An extension of the doctrine of the last section is found in the well-settled principle that mere praise or commendation of one's wares does not constitute a warranty. *Simplex commendatio non obligat*, is the maxim of the law.⁴ It is

¹ Carleton v. Jenks (1897), 80 Fed. R. 937, 47 U. S. App. 734, 26 C. C. A. 265; Roberts v. Applegate (1894), 153 Ill. 210, 38 N. E. R. 676; Benjamin on Sale (6th Am. ed.), § 613.

² Jackson v. Mott, 76 Iowa, 263, 41 N. W. R. 12; McGrew v. Forsythe, 31 Iowa, 179; Figge v. Hill, 61 Iowa, 430, 16 N. W. R. 339; McDonald Mfg. Co. v. Thomas, 53 Iowa, 558, 5 N. W. R. 737; Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. R. 595; Thorne v. McVeagh, 75 Ill. 81; Crenshaw v. Slye, 52 Md. 140; Kingsley v. Johnson, 49 Conn. 462; Tuttle v. Brown, 4 Gray (Mass.), 457; Edwards v. Marcy, 2 Allen (Mass.), 486; Osgood v. Lewis, 2 H. & G. (Md.) 495, 18 Am. Dec. 317.

³ Holmes v. Tyson (1892), 147 Pa. St. 305, 23 Atl. R. 564, 15 L. R. A. 209; Kircher v. Conrad (1890), 9 Mont. 191, 23 Pac. R. 74, 18 Am. St. R. 731, 7 L. R. A. 471; Claghorn v. Lingo, 62 Ala. 230.

⁴ The seller who "recommends" his goods, or declares that they are "good," or "fine," or "nice," or "choice," or the like, does not thereby warrant them; this is *simplex com-*

mendatio. Tewkesbury v. Bennett, 31 Iowa, 88; McDonald Mfg. Co. v. Thomas, 53 Iowa, 558, 5 N. W. R. 737; Wheeler v. Reed, 36 Ill. 81; Childs v. O'Donnell, 84 Mich. 533, 47 N. W. R. 1108; Mason v. Chappell, 15 Grat. (Va.) 572; Hogins v. Plympton, 11 Pick. (Mass.) 97; Barrett v. Hall, 1 Aik. (Vt.) 269; Fraley v. Bispham, 10 Pa. St. 320; Ryan v. Ulmer, 108 Pa. St. 332, 56 Am. R. 210, 137 Pa. St. 309.

A statement by the seller of a threshing machine that it is a very good machine and will do nice work is not a warranty. Worth v. McConnell, 43 Mich. 473, 4 N. W. R. 198 (though *contra* where the manufacturer warrants that a machine "will work well" or do "good work." See notes to preceding section).

"Few articles are sold where the vendor does not praise his wares, and such encomiums are generally understood by purchasers as they are intended by the sellers." Adams v. Johnson, 15 Ill. 345.

"Words of praise or commendation by a vendor, such as are ordinarily used by honest tradesmen as arts of

to be expected that the seller of goods will praise his own, if not deprecate his competitor's goods, and it is expected also that the buyer understands this disposition and weighs the words accordingly. The most common form of this "seller's praise" is the statement respecting the worth or value of the goods. Worth or value is usually a matter of opinion, upon which the buyer is as competent to decide as the seller, and it is well settled, therefore, that the expressions of the seller upon this subject are usually to be deemed neither false representation¹ nor warranty.² An exception exists where the seller has peculiar means of knowledge upon which the buyer relies.³ Representations as to cost, as has been seen,⁴ now usually stand upon a different footing from that of worth or value. They are ordinarily representations of fact.

§ 1246. —. The doctrine of immunity to seller's praise is one which is not to be pressed too far. The tendency of the later cases is to attach more consequence to the seller's affirmations than is given to them in the earlier ones, and it is usually a question for the jury whether his positive affirmations even of worth or value were, under the circumstances, to be regarded as the mere expression of his opinion or as such reliance-begetting representations as constitute a warranty.⁵

§ 1247. Consideration for the warranty — Time of making it. — The contract of warranty, like any other, requires to be supported by a sufficient consideration. Where the war-

persuasion to induce purchase, are deemed insufficient [to constitute a warranty]. They fall within the maxim *simplex commendatio non obligat*, and, however extravagant, they do not in law impose a liability either in the nature of contract or of tort. *Farrow v. Andrews*, 69 Ala. 96." *Tabor v. Peters*, 74 Ala. 90, 49 Am. R. 804. To like effect: *Engelhardt v. Clanton*, 83 Ala. 336, 3 S. R. 630.

Certain expressions, ordinarily

deemed commendatory merely, may acquire a special commercial significance, and when so used may constitute warranties. See *post*, § 1336.

¹ See *ante*, § 936.

² See *ante*, § 1241.

³ *Ormsby v. Budd*, 72 Iowa, 80, 33 N. W. R. 457.

⁴ See *ante*, § 937.

⁵ *Tewkesbury v. Bennett*, 31 Iowa, 83; *McDonald Mfg. Co. v. Thomas*, 53 Iowa, 558, 5 N. W. R. 737; *Wheeler v. Reed*, 36 Ill. 81.

ranty is made at the time of and as part of the contract of sale, the consideration which supports the latter contract suffices also for the former.¹ Where, however, the warranty is not made as a part of the contract of sale, it is not binding unless made upon a separate and sufficient consideration.²

§ 1248. — It is not required that the warranty, to be sustained by the consideration for the sale, shall be made at any particular time in the negotiations. It will be sufficient, and the warranty will constitute a part of the sale, when, but only when, it is made at some time during the negotiations — after the treaty has been begun and before it is finally concluded.³

¹Standard Underground Cable Co. v. Denver Consol. Electric Co. (1896), 76 Fed. R. 422, 39 U. S. App. 340, 22 C. C. A. 258.

²A warranty made after the sale is complete is not valid unless made upon a new consideration. *Summers v. Vaughan*, 35 Ind. 323, 9 Am. R. 741; *Towell v. Gatewood*, 2 Scam. (Ill.) 22, 33 Am. Dec. 437; *Cady v. Walker*, 62 Mich. 157, 28 N. W. R. 805, 4 Am. St. R. 834; *Morehouse v. Comstock*, 42 Wis. 626; *Farmers' Stock-Breeding Ass'n v. Scott*, 53 Kan. 534, 36 Pac. R. 978.

The fact that it was made to induce the buyer to keep the goods is not enough. *Fletcher v. Nelson* (1896), 6 N. Dak. 94, 69 N. W. R. 53; *White v. Oakes* (1896), 88 Me. 367, 34 Atl. R. 175, 32 L. R. A. 592.

Representations not forming part of the contract as finally consummated do not, as has been already seen, constitute a warranty. *Ante*, § 1225; *Hopkins v. Tanqueray*, 15 Com. B. 130; *Zimmerman v. Morrow* (1881), 28 Minn. 367, 10 N. W. R. 139; *James v. Bocage* (1885), 45 Ark. 284; *Holmes v. Tyson* (1892), 147 Pa. St. 305, 23 Atl. R. 564, 15 L. R. A. 209.

In *Bryant v. Crosby* (1855), 40 Me. 9, talk had a month before the sale was held to be too remote to establish a warranty.

³Where the negotiations extended through several days and occupied several interviews, it was held that a warranty on one of them was sufficient, though it was not repeated on the day the negotiations closed. *Way v. Martin*, 140 Pa. St. 499, 21 Atl. R. 428. To same effect: *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584; *Hobart v. Young*, 63 Vt. 363, 21 Atl. R. 612, 12 L. R. A. 693.

In *Crossman v. Johnson*, 63 Vt. 333, 22 Atl. R. 608, 13 L. R. A. 678, a warranty of a horse advertised to be sold at auction, repeated after the sale before payment or delivery, was held sufficient. (See *ante*, § 1227.)

A private warranty relied on by the purchaser, but given to him privately before an auction sale, is not such a fraud on other bidders as to relieve the seller. *Crossman v. Johnson*, *supra*; *Bronson v. Leach*, 74 Mich. 713, 42 N. W. R. 174.

A warranty of a horse after it had been bid off at auction, but before payment and delivery, is sufficient.

§ 1249. — Whether it was so made is usually a question of fact for the jury, the test being that already indicated, whether the whole series of transactions, including the warranty, was really one contract or several distinct ones.¹ If the former, one consideration suffices for the whole; if the latter, each must be supported by its own consideration.

§ 1250. Construction of warranties — In general. — The construction and interpretation of express warranties, whether written or oral, is for the court. If the warranty is in writing, or if the words are not disputed, the legal effect of the warranty is purely a question of law; but if the words are not agreed upon, or if the making of any warranty whatever is denied, then the intervention of the jury becomes necessary to determine this disputed question of fact, subject to the charge of the court as to what shall be the legal effect to be given to the language found to have been used.

McGaughey v. Richardson, 148 Mass. 608, 20 N. E. R. 202, followed in *Douglas v. Moses*, 89 Iowa, 40, 56 N. W. R. 271.

A general statement at a sale of horses by auction, that if any horse offered was unfit for single driving it would be mentioned when he was offered, constitutes a warranty that a horse bought, without any such statement being made, is fit for single driving. *Ingraham v. Union Ry. Co.* (1896), 19 R. I. 356, 33 Atl. R. 875.

In *Vincent v. Leland*, 100 Mass. 432, the property had been delivered, but the price had not been fixed, and it was held that a warranty on the day the price was agreed upon was sufficient. In *Congar v. Chamberlain*, 14 Wis. 258, the buyer of goods, previously contracted for without warranty, had a right to refuse to receive them because not delivered in time, and did refuse unless they were

warranted. *Held*, a sufficient consideration. To same effect: *Ohio Thresher Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. R. 716.

An oral agreement at the time of the sale to warrant is sufficient to sustain a warranty reduced to writing a few days after. *Collette v. Weed*, 68 Wis. 428, 32 N. W. R. 753; *McGaughey v. Richardson*, *supra*. Warranty is not without consideration because, for convenience of parties, the execution of notes given for the goods was delayed. *Falconer v. Smith*, 18 Pa. St. 130, 55 Am. Dec. 611. A renewal of a warranty to a sub-purchaser, based upon his agreement to buy certain other goods for use in connection with those first sold, is upon a sufficient consideration. *Porter v. Pool*, 62 Ga. 238.

¹ *Way v. Martin*, *supra*; *Crossman v. Johnson*, *supra*.

§ 1251. — **Intent governs.**— In construing the language the court will endeavor to ascertain and enforce the meaning which the parties themselves put upon the words which they used, and to do this the situation of the parties, the character of the subject-matter, and the other circumstances of the case must be taken into consideration.¹ In furtherance of the in-

¹ Thus, in *Snow v. Shomacker Mfg. Co.*, 69 Ala. 111, 44 Am. R. 509, it appeared that a piano manufacturer wrote offering terms on his pianos and calling attention to a circular respecting them. On the front page of the circular, in conspicuous type, were the words: "Every piano warranted for five years." The manufacturer, in an action involving these words, contended that their meaning was "Every piano warranted [to be a piano] for five years;" but, said the court, "this, to say the least of it, is a strange use of language," and continued: "What is the proper construction of the words, 'Every piano warranted for five years?'" We think no outside testimony is needed to show their import. Language must be interpreted with reference to the subject about which it is employed. Here the subject was a well-known musical instrument, now universally called a *piano-forte*—having reference to the softness and fullness of its tones. The excellence of such an instrument must depend on many things, and among them, chiefly, the goodness of the materials, and the skill and fidelity of the workmanship. If the instrument be so constructed and adjusted as to respond readily to the touch, to give forth pleasing and properly graduated sounds through the range of its keys, and the framework be so adapted and put together as to retain the strings in tension, and the mechanism does not yield or

break in any part of it, these are certainly points of excellence. But these qualities depend much on the grade and costliness of the instrument. We cannot think the word 'warranted,' without more, is definite enough to cover and guaranty the style or grade of the instrument. That must be determined by the purchaser. We think the true meaning is that, with reasonable and proper treatment and handling, it will not break or give way for five years. In other words, that it has no inherent defect, either of materials or workmanship, which will cause it to break or give way within five years after the sale. And by mechanical skill, we mean not merely that the parts shall be well fitted, and securely put and fastened together,—they must be properly adapted, adjusted and harmonized to secure the proper effect. But the present warranty reaches only breaks, or giving way, occurring within the five years."

In *Richardson v. Brown*, 1 Bing. 344, there was a sale of "a horse, five years old; has been constantly driven in the plough, warranted," and it was held that the warranty referred to soundness only. In *Powell v. Horton*, 2 Bing. N. C. 668, there was a sale "of mess pork. of Scott & Co.," and there was proof that in the market this meant goods *manufactured* by Scott & Co. and not simply goods purchased from Scott & Co., and the

tention of the parties, words will be presumed to have been used in their plain and literal sense, unless the context plainly shows that some other signification was attached to them. For the same reason, if the parties have used technical words,

words were held to be a warranty that they were of that manufacture.

In *Robson v. Miller*, 12 S. C. 586, 32 Am. R. 518, it appeared that defendant sold a fertilizing preparation in bags with tags attached which stated the chemical ingredients. He also used circulars, describing it as "of the highest standard," "prepared under my inspection and control," "introduced under my own name and guarantee." "compounded of purest materials," and referring by name to the chemist under whose supervision it was manipulated and tested, and "whose name gives a warrant for its high character and adaptation to our soil." *Held*, an express warranty, not dependent upon the correctness of the analysis.

In *McGraw v. Fletcher*, 35 Mich. 104, there was an agreement that a diamond drill should be delivered "to be complete in everything for working," but it was held that this was not a warranty that the machine would do the work for which it was purchased, but simply that the machine, such as it was in principle and range of usefulness, should be delivered fully prepared and equipped to do what in principle it was capable of doing.

But a warranty that a threshing machine would do as good work "as any other separator of its size in the United States" was construed to mean that it was reasonably fit to perform the work for which it was intended. *Briggs v. Rumely Co.* (1895), 96 Iowa, 202, 64 N. W. R. 784.

In *Hazlehurst Compress Co. v. Boomer Compress Co.*, 2 U. S. App. 139, 1 C. C. A. 102, 48 Fed. R. 803, there was a warranty that a cotton-pressing machine would press cotton at the rate of sixty bales an hour. *Held*, that this could not be construed as a warranty that it would do so for ten hours a day, but only for a limited time.

A warranty that a machine will do as good work as any other like machine on the market covers not only *amount* and *quality* of work, but also *cost* of operation. *Vermont Farm Mach. Co. v. Batchelder* (1896), 68 Vt. 430, 35 Atl. R. 378. But where the warranty of a boiler was that it would develop two hundred horsepower, it is not implied that it will do this with the most economy in the consumption of fuel. *City Ry. Co. v. Basshor* (1896), 82 Md. 397, 33 Atl. R. 635.

On a sale of a separator and twelve horse-power with a warranty "that with good management the machinery is capable of doing a good business," it will be implied that there is a warranty that the machinery can be successfully operated with twelve horses. *Aultman-Taylor Co. v. Ridenour* (1896), 96 Iowa, 638, 65 N. W. R. 980.

A warranty may be attached to an optional contract to return property if not satisfactory; as where a stallion is warranted to be a breeder, but the instrument also provides that if the buyer is not satisfied the horse may be exchanged for an-

it will be presumed that they intended their ordinary and technical meaning to be applied, unless the context indicates a contrary intention.

§ 1252. — **How words understood.**— Words, moreover, are not to be isolated from their surroundings, but the whole of the contract must be consulted for their meaning; and if ambiguity is present or a variety of interpretations is possible, that construction will be adopted which will best effectuate the intention of the parties. The intention of the parties will be presumed to have been a reasonable and sensible one, and consequently, in case of conflict, that construction will be preferred which leads to reasonable, sensible and businesslike results rather than one whose consequences would be unreasonable or extraordinary.

§ 1253. **Oral and written warranties.**— A warranty, as such, is not required to be in writing. Even though the value of the goods was such as might have brought the contract to sell within the operation of the statute of frauds, the oral warranty will suffice. The defendant may, of course, contend that there

other. *Hefner v. Haynes* (1894), 89 Iowa, 616, 57 N. W. R. 425; *Davis v. Iverson* (1894), 5 S. Dak. 295, 58 N. W. R. 796.

Where the seller of a horse warrants the *title* to him and also recites that the importer warranted him to be a sure foal-getter, the latter constitutes no part of the seller's warranty. *Davis v. Iverson, supra*.

A warranty that a horse is, "with proper handling, a foal-getter," means that he has reasonable capacity in that regard, but it is broken if only eight out of fifty-five attempts are successful. *McCorkell v. Karhoff* (1894), 90 Iowa, 545, 72 N. W. R. 814, 58 N. W. R. 913; *Brown v. Doyle* (1897), 69 Minn. 543.

A warranty that a horse was kind

or free from vicious habits does not amount to a warranty that he will not take fright at a trolley car where the warranty was made at a time when trolley lines had not superseded horse cars. *Meyer v. Krauter*, 56 N. J. L. 696, 29 Atl. R. 426, 24 L. R. A. 575.

A warranty that articles are "good, merchantable" articles means that they are both good and merchantable, and not merchantable merely. *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. R. 104.

A contract to furnish a "first-class" article means one first class in fact, and not merely a first-class one according to the seller's way of making them. *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. R. 644.

was no *sale* because the statute was not complied with; but if there were a valid sale, as where, for example, there has been a delivery and acceptance sufficient to satisfy the statute, it is not necessary for the warranty to be in writing.

In concluding that a warranty need not be in writing, it must be kept in mind that the statement is made of warranty in general, and that it does not include the question, already considered, whether a warranty, if given, shall be incorporated in the memorandum of the contract which the statute requires,¹ nor the question to be next considered, whether a warranty can be annexed by parol to a written contract.

§ 1254. — Completed writing excludes oral warranty.— In respect of the latter question, the rule is well settled that where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous or subsequent conversations, representations or statements will not be received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge or modify that which the writing specifies.²

¹ See *ante*, § 441.

² *Seitz v. Brewers' Refrigerating Co.* (1891), 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. R. 46, is a recent and valuable case upon this question. There a written agreement had been made for putting into Seitz's brewery a refrigerating machine manufactured by the other party. The contract was entirely silent as to the capacity of the machine. but Seitz sought to show that there was a parol contem-

poraneous warranty. The trial court held that this could not be relied upon, and Seitz brought error. The supreme court affirmed the judgment, saying, per Mr. Chief Justice Fuller:

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances

§ 1255. — Otherwise of incomplete writing.— Where, however, the writing does not purport to be final and com-

of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing. *Greenl. Ev.*, § 275.

"There is no pretense here of any fraud, accident or mistake. The written contract was in all respects unambiguous and definite. The machine which the company sold and which Seitz bought was a No. 2 size refrigerating machine as constructed by the company, and such was the machine which was delivered, put up and operated in the brewery. A warranty or guaranty that the machine should reduce the temperature of the brewery to 40° Fahrenheit, while in itself collateral to the sale, which would be complete without it, would be part of the description and essential to the identity of the thing sold; and to admit proof of such an engagement by parol would be to add another term to the written contract, contrary to the settled

and salutary rule upon that subject.

"Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question.

"We are clear that evidence tending to show the alleged independent collateral contract was inadmissible. *Martin v. Cole*, 104 U. S. 30; *Gilbert v. Moline Plough Co.*, 119 U. S. 491; *The Delaware*, 14 Wall. 579; *Naumberg v. Young*, 44 N. J. Law (15 Vroom), 331; *Conant v. National State Bank*, 121 Ind. 323; *Mast v. Pearce*, 58 Iowa, 579; *Thompson v. Libby*, 34 Minn. 374; *Wilson v. Deen*, 74 N. Y. 531; *Robinson v. McNeill*, 51 Ill. 225."

To same effect: *Farmers' Stock Breeding Ass'n v. Scott*, 53 Kan. 534, 36 Pac. R. 978; *Diebold Safe & Lock Co. v. Huston*, 55 Kan. 104, 39 Pac. R. 1035, 28 L. R. A. 53; *Phelps & Bigelow Windmill Co. v. Piercy*, 41 Kan. 763, 21 Pac. R. 793; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. R. 1017; *Rodgers v. Perrault*, 41 Kan. 385, 21 Pac. R. 287; *Reeves v. Corrigan*, 3 N. Dak. 415, 57 N. W. R. 80; *McCray Refrigerator Co. v. Woods*, 99 Mich. 269, 58 N. W. R. 330, 41 Am. St. R. 599; *J. L. Case Plow Works v. Niles*

plete,¹ as where it contains but part of the contract, or is a mere

& Scott Co., 90 Wis. 590, 63 N. W. R. 1013; Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. R. 232, 41 Am. St. R. 33; Merriam v. Field, 24 Wis. 640; McQuaid v. Ross, 77 Wis. 470, 46 N. W. R. 892, 39 Am. St. R. 861, 22 L. R. A. 187; De Witt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. R. 536; Buckstaff v. Russell, 79 Fed. R. 611, 49 U. S. App. 253, 25 C. C. A. 129; Schramm v. Boston Sugar Refining Co., 146 Mass. 211, 15 N. E. R. 571; Frost v. Blanchard, 97 Mass. 155; Whitmore v. Iron Co., 2 Allen (Mass.), 52; Lamb v. Crafts, 12 Metc. (Mass.) 353; Boardman v. Spooner, 13 Allen (Mass.), 353, 90 Am. Dec. 196; Galpin v. Atwater, 29 Conn. 93; Dean v. Mason, 4 Conn. 428; Eighmie v. Taylor, 98 N. Y. 288; Wheaton Roller Mill Co. v. Noye Mfg. Co., 66 Minn. 156, 68 N. W. R. 854; Goulds v. Brophy, 42 Minn. 109, 43 N. W. R. 834, 6 L. R. A. 392; Thompson v. Libby, 34 Minn. 374, 26 N. W. R. 1; Jones v. Alley, 17 Minn. 269; Reed v. Wood, 9 Vt. 285; Mast v. Pearce, 58 Iowa, 579, 8 N. W. R. 632, 12 N. W. R. 597; Nichols v. Wyman, 71 Iowa, 160, 32 N. W. R. 258; Warbasse v. Card, 74 Iowa, 306, 37 N. W. R. 383; Shepherd v. Gilroy, 46 Iowa, 193; Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281, 62 N. W. R. 339; Landman v. Bloomer, 117 Ala. 313, 23 S. R. 75; Johnson v. Powers, 65 Cal. 179, 3 Pac. R. 625; Hanger v. Evins, 38 Ark. 334; Titley v. Enterprise Stone Co. (1889), 127 Ill. 457; Naumberg v. Young (1882), 44 N. J. L. 331.

An answer setting up a warranty made by parol at the time of entering into a written contract of sale, and alleging that it was at the same time agreed that the warranty should

not be inserted in the written contract, is bad. *Smith v. Dallas*, 35 Ind. 255.

A written contract containing no warranty of quality, but showing that the sale was by sample, cannot be added to by parol evidence of a warranty of quality. *Vierling v. Iroquois Furnace Co.* (1897), 170 Ill. 189, 48 N. E. R. 1069.

¹The case of *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. R. 512, is difficult to reconcile with the weight of authority and has been much criticised. If it can be supported, it must be upon the ground stated in the opinion of the court: "There is nothing upon its face to show that it [the written instrument] was intended to express the whole contract between the parties. The referee finds that it does not contain it. . . . It was within the province of the referee to make the finding above referred to (*Lindley v. Lacy*, 17 C. B. (N. S.) 578), and the evidence fully warrants it."

In *Eighmie v. Taylor*, 98 N. Y. 288, 296, the distinction is stated thus: "Where the writing does not purport to disclose the contract or cover it; where in view of its language read in connection with the attendant facts it seems not designed as a written statement of an agreement, but merely as an execution of some part or detail of an unexpressed contract; where it purports only to state one side of an agreement merely, and is the act of one of the parties only in the performance of his promise,—in these and the like cases the exception may properly apply and the oral agreement be shown."

So where the action is upon a note given for the purchase, it is too clear

order for the goods,¹ or a mere receipt,² bill of sale,³ bill of par-

for extended citation that the note is not the contract so as to exclude parol evidence of a warranty. See *Ruff v. Jarrett*, 94 Ill. 475; *Reed v. Hastings*, 61 Ill. 266; *McClure v. Williams*, 65 Ill. 390.

¹In *Phelps v. Whitaker* (1877), 37 Mich. 72, there was a written order for a wind-mill. This order specified the things to be furnished and the terms of payment. It was signed by the buyer only, but was subsequently accepted by the seller and the mill erected. In an action to recover the price, defendant sought to show that the order was procured on the strength of certain representations made by the agent and certain portions of a printed circular shown to defendant, which, he claimed, were warranties, and were broken. They were held admissible, the court saying that "the written order of defendant did not constitute such a contract as would exclude this evidence." To same effect: *Weiden v. Woodruff*, 38 Mich. 130; *Wood Mowing & Reap. Mach. Co. v. Gaertner*, 55 Mich. 453, 21 N. W. R. 885; *Palmer v. Roath* (1891), 86 Mich. 602, 49 N. W. R. 590.

²In *Allen v. Pink* (1838), 4 Mees. & Wels. 140, there was a sale of a horse with warranty. The seller then drew up the following memorandum and gave it to the buyer: "Bought of G. Pink, a horse for the sum of 7*l.* 2*s.* 6*d.*" Signed, "G. Pink." In an action for breach of the warranty, it was urged that parol proof of the warranty was not admissible, but Lord Abinger, while admitting the general principle excluding parol evidence, said: "But the principle does not apply here; there was no evidence of any agreement by the plaintiff

that the whole contract should be reduced into writing by the defendant; the contract is first concluded by parol, and afterwards the paper is drawn up which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not as containing the terms of the contract itself."

In *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185, horses were sold with a warranty, but the seller gave the buyer a memorandum as follows: "Mr. Isaac Hersom bo't of Charles Henderson, one brown horse, eight years old this spring; one bay mare, eight years old this spring. Received payment, \$250. Charles Henderson." The action was for a breach of warranty, and the trial court held that parol evidence of a warranty could not be received; but the supreme court reversed the judgment, holding the buyer not precluded by the receipt. The warranty, it was said, was entirely independent of the matters set forth in the receipt. *Allen v. Pink*, *supra*, was cited and relied upon. *Allen v. Pink*, *supra*, is also cited and relied upon in *Webster v. Hodgkins* (1852), 25 N. H. 128; *Filkins v. Whyland* (1856), 24 Barb. (N. Y.) 379; *Perrine v. Cooley* (1877), 39 N. J. L. 449; *McMullen v. Williams* (1880), 5 Ont. App. 518; *Gordon v. Waterous* (1875), 36 Up. Can. Q. B. 321.

To same effect, see *Neal v. Flint* (1895), 88 Me. 72, 33 Atl. R. 669; *Hildreth v. O'Brien* (1865), 10 Allen (Mass.) 104; *Stacy v. Kemp* (1867), 97 Mass. 166; *Atwater v. Clancy* (1871), 107 Mass. 369.

³This must depend upon the character of the bill of sale—whether it

cels,¹ or the like, and the writing, whatever it may be, is silent upon the subject of a warranty,² parol evidence that a warranty

is the repository of the full and complete agreement of the parties, or only a memorandum of a portion of it, as, for example, of the transfer of the title. In *Kain v. Old*, 2 B. & C. 627, 9 Eng. Com. L. 274, there was a sale of a ship. The law required the contract to be in writing. An advertisement which specified with considerable minuteness the characteristics of the ship was delivered to the buyer, and afterwards a bill of sale containing the usual covenants, but omitting a specification set forth in the advertisement. In an action for breach of warranty it was held that the bill of sale was the only instrument of contract, and that the specification of the advertisement could not be relied upon. *Mumford v. McPherson*, 1 Johns. (N. Y.) 413, 3 Am. Dec. 339, was almost identical in substance and the same result was reached. So where there was a bill of sale of horses sold, including full warranties of title, freedom from incumbrance and right to convey, but silent as to quality, it was held that parol evidence of a warranty of soundness was not admissible. *Rodgers v. Perrault* (1889), 41 Kan. 385, 21 Pac. R. 287.

In *Neal v. Flint* (1895), 88 Me. 72, 33 Atl. R. 669, the bill of sale was deemed not to constitute a complete contract, and parol evidence was received. So, also, in *Hobart v. Young* (1891), 63 Vt. 363, 21 Atl. R. 612, 12 L. R. A. 693.

And where the bill of sale does not purport to be the complete contract, parol evidence of warranty may be received. *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Webster*

v. Hodgkins, 25 N. H. 128; *Filkins v. Whyland*, 24 Barb. (N. Y.), 379; *Collette v. Weed* (1887), 68 Wis. 428.

In *Red Wing Mfg. Co. v. Moe* (1885), 62 Wis. 240, 22 N. W. R. 414, the court say that where there is but a mere bill of sale, silent as to the subject of warranty, and having no other purpose or object than to confer the title, parol evidence of warranty may be received. *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. R. 497, and *Hahn v. Doolittle*, 18 Wis. 196, 86 Am. Dec. 757, were distinguished.

¹ A memorandum of the sale, enumerating the goods and price, and receipting for payment, is such a bill of parcels, and does not exclude an oral warranty. *Perrine v. Cooley* (1877), 39 N. J. L. 449; *Foot v. Bentley* (1870), 44 N. Y. 166, 4 Am. R. 652; *Irwin v. Thompson* (1882), 27 Kan. 643; *Filkins v. Whyland* (1856), 24 Barb. (N. Y.) 379; *Sutton v. Crosly* (1869), 54 Barb. 80; *McMullen v. Williams* (1880), 5 Ont. App. 518; *Gordon v. Waterous* (1875), 36 U. C. Q. B. 321; *Atwater v. Clancy* (1871), 107 Mass. 369.

² Where the writing does contain express warranties in respect of some particulars, oral evidence cannot be received to show warranties in respect of other matters. In such a case "it can no longer be said that the writing does not attempt to express the contract of the parties so far as express warranties are concerned. The presumption then is that it expresses the whole contract as to such warranties." *Merriam v. Field*, 24 Wis. 640; *Smith v. Williams*, 1 Murph. (N. C.) 426, 4 Am. Dec. 564; *Mullain v. Thomas*, 43 Conn.

constituted part of the contract may be received. *A fortiori* may it be received where the writing was really not part of the contract at all.¹

§ 1256. — **How determined.**—Whether the written instrument does purport to be the complete and final repository of the agreement so as to exclude parol testimony is a question of law for the court, to be determined upon an inspection of the instrument.²

252; *Rodgers v. Perrault*, 41 Kan. 385, 21 Pac. R. 287.

So much of the contract as has been reduced to writing cannot be contradicted by parol. *Hutchinson Mfg. Co. v. Pinch*, 107 Mich. 12, 64 N. W. R. 729. And where the warranty, as reduced to writing, is vague, "it is equally an invasion of the rule to permit parol testimony to show that it was in fact more definite." *Hutchinson Mfg. Co. v. Pinch*, *supra*, citing *Stange v. Wilson*, 17 Mich. 342; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147.

Contract partly oral and partly in writing.—But where the contract is made up of letters and conversations, the fact that the seller in a letter made certain representations would not exclude evidence that in a later conversation he made other and more extended representations. *Eureka Fertilizer Co. v. Baltimore Copper Rolling Co.* (1893), 78 Md. 179, 27 Atl. R. 1035. So, where the contract was made up of letters and conversations, and the letters describe the goods by a certain name, *e. g.*, "Star Poplar," it is competent to show that the agent who sold the goods represented that "Star Poplar" was always dry, although the letters said nothing about that fact. *St. Louis Refrig. Co. v. Vinton*, etc.

Co. (1890), 79 Iowa, 239, 44 N. W. R. 370.

¹ When personal property has been sold and delivered with a verbal warranty, a written and different warranty, gratuitously delivered by the vendor to the vendee after the contract of sale has been fully executed, is mere *nudum pactum*, and will not supersede the verbal warranty. *Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. R. 528.

So where, after an oral warranty, a different written warranty, never agreed to, was handed to the buyer, without his knowledge, among other papers. *Valerius v. Hockspiere*, 87 Iowa, 332, 54 N. W. R. 136.

So where a bill of sale subsequently sent contained no warranty. *Foot v. Bentley*, 44 N. Y. 166, 4 Am. R. 652. And where there had been a written order for goods which contained no warranty, and the buyer could and did revoke the order, it was held that the field was then open for a new bargain with a warranty, and that the written order was no longer of consequence. *Challenge Wind Mill Co. v. Kerr*, 93 Mich. 328, 53 N. W. R. 555.

² *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. R. 46; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. R. 1.

§ 1257. — **Impeaching writing for fraud.**— The writing may, of course, be impeached for fraud, and a parol warranty really made may be then relied upon rather than the written one thus shown to be fraudulently imperfect or defective.¹

§ 1258. **Written contract does not exclude implied warranties.**— But while the fact that the contract was in writing may thus exclude oral warranties, as seen in the preceding sections, and while the fact that an express warranty, in many cases, excludes an implied one, as will be seen in the following section, the mere fact that a contract of sale was in writing does not, of itself, exclude the implied warranties which the law raises in contracts of that sort.² As said in a late case,³ “the obligation attached to an executory contract for the sale of goods by the manufacturer or maker cannot be changed by the mere fact that the contract has been reduced to writing. The writing, it is true, is deemed to express the whole agreement of the parties; but since this peculiar liability arises from the nature of the transaction and the relation of the parties, without express words or even actual intention, it will remain as part of the seller’s obligation unless in some way expressly excluded. All implied warranties, therefore, from their nature, may attach to a written as well as an unwritten contract of sale. The parties may, of course, so contract with each other as to eliminate this obligation from the transaction entirely. The seller may by express and unequivocal words exclude it, and, in like manner, the buyer may waive it. So, also, the parties may provide for a delivery or inspection of the article

¹Where the buyer cannot read, and the seller fraudulently reduces to writing something other than the warranty orally agreed upon, the buyer may rely upon the latter. *Frohreich v. Gammon*, 28 Minn. 476. It is competent for the purchaser to prove, in an action to recover the price, that there was a verbal warranty of quality, notwithstanding the existence of a subsequent writ-

ten warranty, if the latter is void on the ground that it was procured by fraud. *Aultman v. Falkum* (1892), 51 Minn. 562, 53 N. W. R. 875.

²*Carleton v. Lombard* (1896), 149 N. Y. 137, 601, 43 N. E. R. 422; *Blackmore v. Fairbanks* (1890), 79 Iowa, 282, 41 N. W. R. 548; *Gillespie v. Cheney*, [1896] 2 Q. B. 59.

³*Carleton v. Lombard*, *supra*.

when made, which will operate to extinguish the liability upon acceptance."

§ 1259. Express warranty as excluding implied warranty.

It has been seen in a preceding section¹ that a written warranty excludes the proof of a parol one, and it is equally well settled, as a general rule, that an express warranty excludes the possibility of another and implied one respecting the same subject-matter.² Where the parties have expressly agreed upon a warranty, the law must, in the absence of fraud or mistake, conclusively presume that they have included in their express agreement whatever of warranty is to prevail between them respecting the matter to which it refers. An express warranty of quality, for example, must therefore exclude an implied warranty of quality.³

¹ See *ante*, § 1254.

² See cases in following note.

³ In *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. R. 536, it is said: "There are numerous well-considered cases that an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use. *International Pavement Co. v. Smith*, 17 Mo. App. 264; *Johnson v. Latimer*, 71 Ga. 470; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. R. 359; *Shepherd v. Gilroy*, 46 Iowa, 193; *McGraw v. Fletcher*, 35 Mich. 104." To like effect: *Bucy v. Pitts Agricultural Works*, 89 Iowa, 464, 56 N. W. R. 541; *Malsby v. Young*, 104 Ga. 205, 30 S. E. R. '854, when the two relate to the same subject-matter.

An express warranty of certain qualities excludes an implied warranty of other qualities. *Case Plow Works v. Niles*, 90 Wis. 590, 63 N. W. R. 1013; *Dickson v. Zizinia*, 10 C. B. 602; *Whitmore v. Iron Co.*, 2 Allen (Mass.), 52; *Deming v. Foster*, 42 N. H. 165; *International Pavement Co.*

v. Smith, 17 Mo. App. 264; *Aultman v. Weber*, 28 Ill. App. 91; *Forest City Ins. Co. v. Morgan*, 22 Ill. App. 198.

In *Case Plow Works v. Niles* (1895), 90 Wis. 590, 63 N. W. R. 1013, there was an express warranty of wheels "against defects in material and workmanship;" it was held to exclude an implied warranty that the wheels should be suitable for the purposes for which they were ordered. "The fact that the limited warranties going to the question of suitability of the wheels were expressed in the contract, by the strongest implication, excludes and negatives the idea that it was intended that other or more comprehensive warranties should exist, and repels any implication of law to that effect. The contract as written must be taken as the final and conclusive evidence of all that was intended or agreed upon. The familiar rule, '*expressio unius est exclusio alterius*,' clearly applies. The demand of the purchaser for certain specified warranties indicates that no other were intended or ex-

§ 1260. — When relating to different subject.—Whether, however, an express warranty upon one subject will exclude an implied warranty upon another, as whether an express warranty of quality will exclude an implied warranty of title, or *vice versa*, is a question upon which there may be more room for doubt. It is, of course, possible for the parties by their contract to declare that the expressed warranty is the only one which shall obtain between them, and such a declaration will be effective.¹ There are also cases which seem to hold that the expression of any warranty prevents the implication of any, particularly where the express warranty is also a written one;²

pected. Had the parties intended that there should be an implied warranty, there was no occasion to make any stipulation on the subject. The one introduced must be taken as covering the entire subject; otherwise it would be idle and unmeaning. Adjudicated cases on this point are numerous and conclusive. We have not been referred to any decision expressly on the point to the contrary. *Dickson v. Zizinia*, 10 C. B. 602; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Baldwin v. Van Deusen*, 37 N. Y. 487; *De Witt v. Berry*, 134 U. S. 306; *Carleton v. Lombard*, 72 Hun, 254; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Deming v. Foster*, 42 N. H. 165; *Budd v. Fairman*, 8 Bing. 48; *Shepherd v. Gilroy*, 46 Iowa, 193."

But in *Alpha Checkrower Co. v. Bradley* (1898), 105 Iowa, 537, 75 N. W. R. 369, there was an express warranty that corn-cutting machines should be "well made and finished," and the court, citing the general rule, said that it did not "extend to the exclusion of warranties implied by law, where they are not excluded by the terms of the contract. Thus, an express warranty of title does not exclude an implied warranty of qual-

ity. . . . A warranty will not be implied in conflict with the express terms of the agreement, but there is no conflict of that kind in this case. . . . We think that it should be implied if it is not expressed that the cutters were reasonably fit for the purpose for which they were intended."

¹ In *Jackson v. Langston*, 61 Ga. 392, the buyer entered into a written contract for the purchase of fertilizer, and in the contract acknowledged that the fertilizer "is guaranteed to me as to its effect on crops *only* as to the analysis of the State inspector," and it was held that this excluded any implied warranty of its fitness. And in *Baldwin v. Van Deusen*, 37 N. Y. 487, where on the sale of a note it was "agreed that this was a genuine note *and not otherwise*," it was held that the implication of any other warranty had been expressly excluded.

² But a contract for a piano silent as to warranties, though containing a statement that "there is no agreement or understanding between the salesman and myself otherwise than herein mentioned," does not exclude the warranty implied by law of

but the weight of authority is undoubtedly to the effect that an implied warranty may arise notwithstanding an express one, where each relates to a different subject-matter, and the implied has not been expressly excluded.¹

§ 1261. —. Certainly the implied warranty of title ought not to be excluded by the mere fact that an express warranty of quality has been given; and the reverse of the proposition seems to be almost as self-evidently true. In any event it must be borne in mind that the rule is one of construction merely, based upon the presumed intention of the parties, and will give way where the contract itself shows that their intention was otherwise. As is said by Mr. Justice Willes, "the doctrine that an express provision excludes implication does not affect cases in which the express provision appears, upon the true construction of the contract, to have been superadded for the benefit of the buyer."²

proper construction. *Little v. Van Syckle* (1898), 115 Mich. 480, 73 N. W. R. 554.

¹ In *Bucy v. Pitts Agricul. Works*, 89 Iowa, 464, 56 N. W. R. 541, the court say: "The rule deducible from the authorities is that an implied and an express warranty may exist under the same contract, as when the expressed does not relate to the obligations created by the implied; but when the expressed warranty does provide as to the same obligation, it excludes the implied. In other words, the law will not imply anything as to matters about which the parties have expressly agreed." And in *Blackmore v. Fairbanks*, 79 Iowa, 282, 44 N. W. R. 548, it is said: "It is true that, as a general rule, no warranty will be implied where the parties have expressed in words the warranty by which they mean to be bound; but the rule does not extend to the exclusion of warranties implied by law, where they are not excluded

by the terms of the contract. Thus, an express warranty of title does not exclude an implied warranty of quality. [Conversely, an express warranty of quality will not exclude the implied warranty of title.] 2 Benj. Sales (Corbin's ed.), § 1002, note 40, and cases therein cited; [viz.: *Wells v. Spears*, 1 McCord (S. C.), 421; *Wood v. Ashe*, 3 Strob. (S. C.) 64; *Trimmier v. Thomson*, 10 S. C. 164, 186; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 626; *Roe v. Bachel-dor*, 41 Wis. 360; *Wilcox v. Owen*, 64 Ga. 601." As to *Merriam v. Field*, and *Boothby v. Scales*, *supra*, see *Case Plow Works v. Niles*, 90 Wis. 590, 63 N. W. R. 1013.

² In *Mody v. Gregson*, L. R. 4 Ex. 49, 53. Thus in *Bigge v. Parkinson*, 7 H. & N. 955, a warranty that provisions sold should pass the inspection of the East India Company was held not to exclude the implied warranty that the goods were also merchantable.

§ 1262. **Express warranty as excluding usage.**—For like general reasons an express warranty leaves no room for the operation of usage with reference to the same subject-matter. Thus where there was a warranty, on the sale of cloth, that the cloth was described as of a certain weight in the invoice, usage cannot be shown to make the warranty, in effect, that the invoice weight was the actual weight. “This does not seem to us,” said the court,¹ “to be explaining the meaning of the terms used in the contract, but an attempt to give to the contract a force and effect which its terms do not warrant. When the meaning of the terms used in a written contract is ascertained, the effect and interpretation of the instrument are to be determined by the court as a matter of law, and cannot be changed or controlled by evidence of the understanding of the parties or of the community.”

§ 1263. —. So where butter is sold with a warranty of quality, the effect of the warranty cannot be limited by proof of a local usage to the effect that the seller shall not be liable to take back the butter or make any deduction in price unless the buyer examines it as soon as possible after receipt and returns it, or gives notice of the defect, at once.² That the legal effect of their contract should be controlled by such a usage, said the court, could not have been the intention of the parties. “If they knew the usage and their rights and liabilities under it, and made an express contract of warranty, it must be presumed that they were not satisfied with their rights and liabilities under the usage, and therefore made the express contract taking the case out of the usage. The usage was local. If not known to the parties, it could in no event affect their rights and liabilities.”

§ 1264. —. And so where a horse was sold with an express warranty of soundness, it was held that its effect was not to be controlled by an alleged local usage among horsemen, but of

¹Rice v. Codman (1861), 1 Allen (Mass.), 377. ²Marshall v. Perry (1877), 67 Me. 78.

which the buyer was ignorant, that such a usage should not extend to latent defects.¹ "It is well settled," said the court, "that parties contracting are supposed to do so with reference to the *known* usages and customs which enter into and govern the subject-matter to which the contract relates, and all contracts made in the ordinary course of business, without particular stipulations to the contrary, are presumed to be made in reference to the usages and customs which exist; but this rule is subject to the wholesome limitation that such usage must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract, either expressly or by implication."²

§ 1265. Time, duration and place of warranty.—The time and place to which words of present warranty respecting ascertained goods shall be deemed to apply must ordinarily be presumed to be the place at which the goods are at the time of making the contract.³ Where, however, the seller agrees to

¹ Van Hoesen v. Cameron (1884), 54 Mich. 609, 20 N. W. R. 609.

² Citing Magee v. Atkinson, 2 M. & W. 442; Adams v. Wordley, 1 M. & W. 374; Trueman v. Loder, 11 Ad. & El. 589; Yates v. Pym, 6 Taunt. 446; Insurance Co. v. Wright, 1 Wall. 456; Barlow v. Lambert, 28 Ala. 710; Lewis v. Thatcher, 15 Mass. 431; Homer v. Dorr, 10 Mass. 26; Barksdale v. Brown, 1 N. & McC. 517; Allen v. Dykers, 3 Hill, 593; Hinton v. Locke, 5 Hill, 437; Gross v. Criss, 3 Gratt. 262; Barnard v. Kellogg, 10 Wall. 384; Blackett v. Royal Exch. Assur. Co., 2 Cr. & J. 249; Simmons v. Law, 3 Keyes, 219; Coxe v. Heisley, 19 Pa. St. 243.

³ See *post*, § 1298. In Luthy v. Waterbury (1892), 140 Ill. 664, 30 N. E. R. 351, there was a sale of several lots of binder twine situated at different places, and there was the following warranty: "Party of first part

hereby guarantee that this twine is in good condition and a merchantable article." Said the court: "When? Obviously at the date of the agreement."

In Bothwell v. Farwell (1887), 74 Iowa, 324, 37 N. W. R. 392, where there was a sale of one hundred and seven merino bucks with a warranty that they were all sound and in a healthy condition, and that each one would serve twenty-five ewes, it was held that this warranty referred to their condition at the time of the sale and was not a warranty against future disease rendering them unable to serve that number of ewes each.

In Merrick v. Bradley (1862), 19 Md. 50, Bradley sold Wright a slave, warranting that she was a slave for life and "sound up to this day;" he also gave Wright an order on X, in whose possession the slave was, for her delivery to Wright. While Wright

produce goods of a specified character at a future time or at a particular place, then the words of warranty will usually be

was waiting at X's door, after delivery of the order, to get the slave, she committed suicide. *Held*, that the warranty referred to the condition at the time of the sale, and that therefore the suicide was no breach.

In *English v. Spokane Commission Co.* (1893), 15 U. S. App. 218, 6 C. C. A. 416, 57 Fed. R. 451, the defendant, in Spokane Falls, telegraphed to plaintiff in Omaha: "Wire price car strictly fresh eggs, new cases." Plaintiff replied: "Car fresh eggs, 16. Track here for immediate acceptance." Defendant answered: "If eggs strictly fresh, 14 cents. Answer if accepted." Plaintiff replied: "Offer eggs accepted." Said the court: "We are of opinion that the warranty expressed in the telegrams related to the condition of the eggs placed on board the cars at Omaha. The plaintiffs would not be liable for any deterioration of quality rendering them unmerchantable at Spokane, where they were delivered to the defendant, if such deterioration resulted necessarily from the transit. *Bull v. Robinson*, 10 Exch. 342; *Mann v. Everston*, 32 Ind. 356; *Leggatt v. Brewing Co.*, 60 Ill. 158; 2 Schouler, Pers. Prop., § 355; 2 Benj. Sales (8th ed.), § 944, note 15; *id.*, § 991." See also, that words of warranty must ordinarily be presumed to refer to the condition of the goods at the time of the sale, *Bowman v. Clemmer* (1875), 50 Ind. 10 (where the court say the animals must have been diseased at the time the representation was made); *Miller v. McDonald* (1861), 13 Wis. 673 (where the court say "it must be shown that the unsoundness existed at the time of the sale,

and nothing will be suffered to rest upon mere inference or presumption"); *Smith v. Swarthout* (1862), 15 Wis. 550 (where it was held that balking by a horse seven weeks after he had been sold with a warranty that he was true in harness was too remote).

In *Lord v. Edwards* (1889), 148 Mass. 476, 12 Am. St. R. 581, 20 N. E. R. 161, there was a contract by letter, the material parts of which were: "We have made sale to you of twelve hundred tons extra Manila sugars, about No. 9 D. S. in color, at 10.10 per ton, f. o. b., and we understand it is your intention to load same on the Republic on her arrival at Manila. . . . It is further understood that the sugar is sold on a basis of 83° pol'r with 3d. per cwt. per degree downward, and fractions of degree in proportion. The sugars to be thoroughly sampled and tested on arrival." *Held*, that the warranty referred to quality at place of shipment, and that the provision for sampling and testing on arrival did not import a warranty against damage by perils of the sea, or from wet weather, or sweating, or other causes of deterioration operating during a long voyage.

The same rule is applied in *Leopold v. Vankirk*, 27 Wis. 152, where hams were sold, to be packed in the packers' "usual good style" for shipment to Lake Superior. It was held that the warranty had reference to their condition at the time and place of the sale, "and not to their condition at the place to which they were to be transported, unless such latter condition originated in defects ex-

deemed to have reference to that time and place.¹ It is, of course, entirely competent for the parties to make such contracts as to the time or place or duration of the warranty as please them, and where their intention is clearly expressed it will control;² but in the absence of such an expression the general presumptions must be those above stated.

§ 1266. — **Warranty as to future event.**—It was at one time thought there could be no warranty as to things to transpire in the future, and Blackstone so lays down the rule;³ but the law is now otherwise, and there is no question that there

isting and unknown to the buyers when the sale took place.”

¹ *Draws v. Logging Co.*, 53 Minn. 199, 54 N. W. R. 1110; *Bull v. Robinson*, 10 Exch. 342 (quoted from in note to § 1298, *post*); *Forcheimer v. Stewart*, 65 Iowa, 594, 54 Am. R. 30, where, on a sale of hams warranted to be of a certain quality to be shipped south, the seller retained title and control until the goods reached their destination, and it was held that the warranty referred to the latter place; *Beer v. Walker*, 46 L. J. C. P. 677, where game was to be supplied by rail weekly to a dealer in a distant place, and it was held that the quality of the goods on arrival in due course, and not their condition when shipped, was the test; *Tenney v. Mulvaney*, 9 Oreg. 405, where a contract to deliver “good, sound merchantable logs” was construed with reference to the situation of the parties and the place where the contract was to be performed.

² Thus in *Blodget v. Safe Co.*, 76 Mich. 538, 43 N. W. R. 451, there was a written contract for the sale of a safe, which provided: “Safe to be warranted for one year against swelling or bulging or warping or being

defective in construction.” Four years after the sale it was found to be defective, though there was no evidence that any defect was discovered the first year or that the defects subsequently discovered were due to any causes existing during the first year. *Held*, that there could be no recovery. So of a warranty of a piano for five years. *Snow v. Shomacker Mfg. Co.*, 69 Ala. 111, 44 Am. R. 509.

In *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. R. 660, there was a sale of “*Prosperi Chianti Wine*,” “all to be in good merchantable order;” “to be approved by buyer within three days after delivery.” It was held that the warranty of merchantability was limited to the three days named.

In *Bywater v. Richardson*, 1 Ad. & El. 508, there was a warranty of soundness, but the sale was made at a repository where there was a posted notice that a warranty of soundness when given there was to remain in force only until noon of the following day. It was held, on proof of the buyer’s knowledge of the rule, that the warranty was limited accordingly.

³ 3 Blackstone’s Com. 166.

may be a warranty as to a future event, where such an intention is clearly manifested.¹

§ 1267. — Warranty against future acts of government.

So, undoubtedly, the parties may warrant with reference to the future acts of the public authorities; but in accordance with the rule that general warranties are to be construed with reference to existing conditions, such a warranty will not be extended by construction so as to protect the buyer against future acts of the public authorities.²

§ 1268. Representations concerning soundness in animals.

It was formerly thought that representations concerning the "soundness" of animals and slaves must *prima facie* be deemed to be mere representations and not warranties, unless so intended by the seller, and therefore that they imposed no liability when not knowingly false;³ but the modern cases have

¹Eden v. Parkinson, 2 Doug. 733; Osborn v. Nicholson (1871), 13 Wall. (U. S.) 654.

In Richardson v. Mason (1868), 53 Barb. (N. Y.) 601, an action was maintained on a warranty that cows sold "were coming in in good season;" though this, as the court pointed out, was also a warranty as to their present condition. So in White v. Steloh, 74 Wis. 435, 43 N. W. R. 99, it is said that there may be an express warranty on the sale of a bull-calf that when grown he will be a sure stock-getter.

²In Osborn v. Nicholson (1871), 80 U. S. (13 Wall.) 654, there was a sale of a negro, expressly warranted "a slave for life." He was liberated soon afterwards by the United States government. In an action for the price, the breach of this warranty was set up as a defense; but it was held that the seller could recover. Quoting from Bailey v. Miltenberger (1856), 31 Pa. St. 41, the rule that "It

has never been supposed that the vendor or vendee contemplated a warranty against the exercise of this power [of eminent domain] whenever the public good or convenience required it," the court said that a similar principle was applicable here. "The buyer might have guarded against his loss by a guaranty against the event which has caused it. We are asked, in effect, to interpolate such a stipulation and to enforce it, as if such were the agreement of the parties. This we have no power to do. Our duty is not to make contracts for the parties, but to administer them as we find them. Parties must take the consequences, both of what is stipulated and of what is admitted [omitted?]. We can neither detract from one nor supply the other." Mittelholzer v. Fullarton, 6 Ad. & EL. (N. S.) 989, was cited and relied upon as strictly in point.

³See Erwin v. Maxwell, 3 Murph.

established a different rule, in keeping with the general principles already referred to,¹ and it is now well settled that a positive affirmation respecting the soundness of animals, made to induce the sale and relied on by the purchaser, will be deemed to constitute a warranty even though it cannot be shown that the seller *intended* it as such.²

§ 1269. — **Words used.**—To constitute a warranty of soundness it is not necessary that it should be made in express terms, or that the word “sound” should be used; equivalent expressions will clearly suffice. Thus to assert of a horse that it is “all right” may well be found to be a warranty that the horse is sound.³

§ 1270. — **What constitutes unsoundness.**—What constitutes unsoundness, and therefore a breach of the warranty of soundness, is a question not readily yielding itself to fixed rules, and one which has given rise to some difference of opinion. With respect of horses the rule laid down by Baron Parke⁴ has been generally adopted in England and America.

(N. C.) 241, 9 Am. Dec. 602; *McFarland v. Newman*, 9 Watts (Pa.), 55, 34 Am. Dec. 497; *House v. Fort*, 4 Blackf. (Ind.) 293; *Baird v. Matthews*, 6 Dana (Ky.), 129; *Inge v. Bond*, 3 Hawks (N. C.), 101; *Whitney v. Sutton*, 10 Wend. (N. Y.) 411; *Tyre v. Causey*, 4 Harr. (Del.) 425; *Hawkins v. Berry*, 5 Gilm. (Ill.) 36; *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

In a late case in Pennsylvania a statement that a horse is kind, sound and gentle is held not to amount to a warranty (*Holmes v. Tyson*, 147 Pa. St. 305, 23 Atl. R. 564, 15 L. R. A. 209); but Pennsylvania adheres more closely to the old doctrine in *Chandelor v. Lopus* than the modern English and American courts.

¹ See *ante*, § 1235.

² *Hobart v. Young*, 63 Vt. 363, 21 Atl. R. 612, 12 L. R. A. 693; *Joy v.*

Bitzer, 77 Iowa, 73, 41 N. W. R. 575, 3 L. R. A. 184.

A statement by the seller of mules, made in response to inquiry by the buyer, that “they are as sound as a dollar,” is a warranty of soundness, and not the mere expression of the seller’s opinion. *Riddle v. Webb* (1895), 110 Ala. 599, 18 S. R. 323.

³ It was so held in *McClintock v. Emick*, 87 Ky. 160, 7 S. W. R. 903. So of an assertion that a bull sold for beef was “fat and all right.” *Money v. Fisher*, 92 Hun (N. Y.), 347.

Whether a statement that a cow is “all right” amounts to a warranty was held to be a question for the jury in *Tuttle v. Brown*, 4 Gray (Mass.), 457, 64 Am. Dec. 80.

⁴ In *Kiddell v. Burnard*, 9 M. & W. 668. To like effect: *Roberts v. Jenkins*, 21 N. H. 116, 53 Am. Dec. 169

He said: "I have always considered that a man who buys a horse warranted sound must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of

(with valuable note); *Kornegay v. White*, 10 Ala. 255; *Brown v. Bigelow*, 10 Allen (Mass.), 242.

The following is adapted from the English text of Benjamin on Sale: What constitutes unsoundness has been the subject of considerable attention, and of some difference of opinion. Any *organic* defect must usually be considered an unsoundness, such as that a horse has been nerved (*Best v. Osborne*, Ryan & Moo. 290), or has bone spavin in the hock (*Watson v. Denton*, 7 C. & P. 85), or ossification of the cartilages (*Simpson v. Potts*, *Oliphant's Law of Horses* (ed. 1847), 224), or the navicular disease (*Matthews v. Parker*, *Oliphant*, 228; *Bywater v. Richardson*, 1 A. & E. 508), or thick wind (*Atkinson v. Horridge*, *Oliphant*, 229), or is "wind-broken" (*Willan v. Carter*, *Oliphant* (ed. 1882), 74), or cataract (*Higgs v. Thrale*, *Oliphant*, 71), or glaucoma (*Settle v. Garner*, *Oliphant*, 86), or glands (*Woodbury v. Robbins*, 10 Cush. (Mass.) 520), or lung disease (*Hyde v. Davis*, *Oliphant*, 453), or malformation of the eye rendering the horse near-sighted and a "shyer" (*Holliday v. Morgan*, 1 E. & E. 1), or that sheep are affected with foot-rot (*Pinney v. Andrus*, 41 Vt. 631), or goggles (*Jo'liff v. Bendell*, Ry. & Moo. 136).

Mere badness of shape that is likely to produce unsoundness, but has not yet done so, is not an unsoundness which will constitute a breach of a present warranty; as where a horse's

leg was so crooked that he could not work for any length of time without injuring himself (*Dickinson v. Follett*, 1 M. & Rob. 299); or has hocks so formed as to be likely to throw out a curb (*Brown v. Elkington*, 8 M. & W. 132); or is so thin-soled as to be likely to have lameness in his feet (*Bailey v. Forrest*, 2 C. & K. 131).

Whether "corns" constitute unsoundness is a question of fact of which the court cannot take judicial notice. If it diminishes the value and usefulness of the horse, it is an unsoundness though it is temporary and curable. *Alexander v. Dutton* (1878), 58 N. H. 282 [citing *Kiddell v. Burnard*, 9 M. & W. 668; *Roberts v. Jenkins*, 21 N. H. 116].

Crib-biting is a *vice*, and will constitute a breach of warranty that a horse was "right" or "sound and right," or "free from vice" (*Scholefield v. Robb*, 2 Mood. & R. 210; *Paul v. Hardwick*, *Oliphant*, 81; *Walker v. Hoisington* (1871), 43 Vt. 608), but is not an *unsoundness* (*Broennenburgh v. Haycock*, Holt, N. P. 630), unless it affects the health and condition of the horse so as to render him less serviceable (*Washburn v. Cuddihy* (1877), 8 Gray (Mass.), 430).

"Roaring" in a horse which affects his serviceability is an unsoundness (*Onslow v. Eames*, 2 Stark. 81), but otherwise not (*Bassett v. Collis*, 2 Camp. 523).

"Splints" will constitute unsoundness under the same condition. *Margetson v. Wright*, 8 Bing. 454; *Smith*

the sale the horse has any disease which either actually does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound. . . . I think the word 'sound' means what it expresses, namely, that the animal is sound and free from disease at the time he is warranted to be sound."

§ 1271. — Disease need not be permanent or incurable.

Under this rule it is unnecessary that the disease be either permanent or incurable; it is enough if it detracts from the present serviceability of the animal. Neither is it necessary that the disease, at the time of the sale, be fully developed or matured; it is enough if there then existed the seeds or germs of the disease which subsequently manifested itself.¹ So, on the other hand, there is no unsoundness within the meaning of this rule because there may be some temporary and curable disease which does not diminish present serviceability.²

§ 1272. Warranty against known defects — Usually none.

A general warranty does not usually extend to defects which are known to the buyer, or to defects which are plain and obvious to the senses and which it requires no skill to detect.³

v. O'Bryan, 11 L. T. (N. S.) 346; note to Bassett v. Collis, *supra*.

A mare with foal conforms to a warranty that she was "all right in every way for livery purposes," according to Whitney v. Taylor (1868), 54 Barb. (N. Y.) 536.

Soundness in a slave was held to include mind as well as body (Simpson v. McKay, 12 Ired. (N. C.) 141; Tatum v. Mohr, 21 Ark. 349; Caldwell v. Wallace, 4 Stew. & P. (Ala.) 282); though a mere warranty that

a slave was "healthy" was held to extend to the body only (Nelson v. Biggers, 6 Ga. 205).

¹ But the disease or defect, either in its complete or its incipient form, must have existed at the time of the sale. Bowman v. Clemmer, 50 Ind. 10; Miller v. McDonald, 13 Wis. 673; Merrick v. Bradley, 19 Md. 50; Woodbury v. Robbins, 10 Cush. (Mass.) 520.

² See cases cited in note 4 to section 1270.

³ Fisher v. Pollard, 2 Head (Tenn.),

It is otherwise, however, where the seller intentionally contrives to conceal defects which would ordinarily be apparent.¹ And though the general principle is that a general warranty will not protect against known or obvious defects, it is merely

314. 75 Am. Dec. 740; *Long v. Hicks*, 2 Humph. (Tenn.) 305; *Connersville v. Wadleigh*, 7 Blackf. (Ind.) 102, 41 Am. Dec. 214; *Storrs v. Emerson*, 72 Iowa, 390, 34 N. W. R. 176; *Studerv. Bleistein*, 115 N. Y. 316, 22 N. E. R. 243, 5 L. R. A. 702 [citing *Schuyler v. Russ*, 2 Caines, 202; *Jennings v. Chenango County Ins. Co.*, 2 Denio, 75; *Bennett v. Buchan*, 76 N. Y. 386; *Day v. Pool*, 52 N. Y. 416; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434]; *Hill v. North*, 34 Vt. 604; *Branson v. Turner*, 77 Mo. 489; *Williams v. Ingram*, 21 Tex. 300; *Marshall v. Drawhorn*, 27 Ga. 275; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. R. 675; *Leavitt v. Fletcher*, 60 N. H. 182; *Hanson v. Edgerly*, 29 N. H. 343; *Mulvany v. Rosenberger*, 18 Pa. St. 203; *Richardson v. Johnson*, 1 La. An. 389; *Brown v. Bigelow*, 10 Allen (Mass.), 242; *Huston v. Plato*, 3 Colo. 402; *Dean v. Morey*, 33 Iowa, 120; *Thompson v. Harvey*, 86 Ala. 519, 5 S. R. 825; *Butterfield v. Burroughs*, 1 Salk. 211; *Southern v. Howe*, 2 Roll. 5; *Margetson v. Wright*, 7 Bing. 603, 8 Bing. 454.

Where a kiln of brick were warranted "to be good brick and all right" when in fact they were not, as the buyer might have discovered if he had examined fully enough, but it would have required that he get on top of the kiln and remove three thicknesses of boards and other things, it was held that the defect was not so obvious as to prevent the buyer from relying upon the war-

ranty. *Meickley v. Parsons*, 66 Iowa, 63, 55 Am. R. 261. So where a slave was sold with a warranty of soundness, but had a diseased knee which the buyer might have discovered if he had had the slave stripped, it was held that the defect was not an obvious one within the rule. *Thompson v. Bertrand*, 23 Ark. 730. So where a steam-engine was sold with a warranty, but there was a defect in the steam chest which could have been discovered had the cover been taken off, but the buyers had no occasion to remove it, it was held that the buyers might rely on the warranty. *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. R. 100, 6 Am. St. R. 122.

¹ Thus in *Kenner v. Harding*, 85 Ill. 264, 28 Am. R. 615, the seller of a mare and mule had them both in one stall with litter about their legs, where inspection was difficult and defects not observable. When the buyer was about to examine them, the seller remarked that the mule had once kicked; that the mare had had a slight attack of sweaney, but that both were sound. The buyer thereupon desisted from examining. The mule proved to have defective ankles. *Held*, the jury were justified in finding the seller used artifice to conceal the defects, and the general rule did not apply. [Citing *Chadsey v. Greene*, 24 Conn. 562, where the seller made use of a confederate to puff his character and induce reliance upon his statements, and the general rule was held inapplicable; *Gant v. Shelton*, 3 B. Mon. (Ky.) 420,

a rule of construction, and will yield to evidence of a contrary intention.

§ 1273. — **But may be given.**— Thus it is certain that the consequences of a known or obvious defect may be guarded against by an express warranty in terms directed against them;¹

where it is said that the general rule does not apply because the seller used artifice to produce a false impression, though it is not stated what the artifice was; and *Robertson v. Clarkson*, 9 B. Mon. 507, to the same effect. There the seller falsely attributed an abnormal condition to an accident whose results would therefore pass away; but it proved to be an irremediable disease.] The same facts and rule are found in *Brown v. Weldon*, 27 Mo. App. 251, affirmed 99 Mo. 564; and in *Perdue v. Harwell*, 80 Ga. 150, 4 S. E. R. 877, where the seller falsely attributed to a harmless disease symptoms which proved to belong to a serious one.

To like effect: *Hanks v. McKee*, 2 Littell (Ky.), 227, 13 Am. Dec. 265; *Biggs v. Perkins*, 75 N. C. 397; *Roseman v. Canovan*, 43 Cal. 110; *Armstrong v. Bufford*, 51 Ala. 410.

¹ In *Watson v. Roode* (1895), 30 Neb. 264, 46 N. W. R. 491; 3 C., 43 Neb. 348, 61 N. W. R. 625, the purchaser called attention to what appeared to be a defect, but the seller expressly warranted that it was not, though it proved to be. *Held*, that the buyer could recover. In *Samuels v. Guin*, 49 Mo. App. 8, a peculiarity in the horse's eyes was pointed out, but the seller gave a plausible explanation and said "they are as sound as dollars." It proved to be the first stages of a disease from which the horse became blind. *Held*, that the buyer could recover. In *Thompson v. Har-*

vey, 86 Ala. 519, 5 S. R. 825, the buyer said that he thought the horse's withers were not right, but the seller assured him that they were in the natural shape and that the horse was all right, though it proved otherwise. The buyer was permitted to recover. In *Fitzgerald v. Evans*, 49 Minn. 541, 52 N. W. R. 143, complaint was made by the buyer concerning a bunch on the horse's leg. The seller expressly warranted that it would "all disappear entirely." It did not do so and proved to be a spavin. The buyer recovered. Followed in *Hansen v. Gaar* (1895), 63 Minn. 94, 65 N. W. R. 254. To like effect: *Liddard v. Kain*, 9 Moore, 356, 2 Bing. 183.

In *Pinney v. Andrus*, 41 Vt. 631, the buyer of sheep feared that they were infected with foot-rot; the seller expressly warranted that the apparent difficulty was not foot-rot; it proved to be that disease, and the buyer recovered. In *Tabor v. Peters*, 74 Ala. 90, 49 Am. R. 804, the maker of a churn warranted that it was made of juniper wood and that the rod was nickel plated. The churn was painted, and the buyer did not discover at the time that it was made of pine and not juniper wood, and that the rod was simply polished iron. It was held that these defects were not so obvious as to prevent the buyer from relying on the warranty. *Cf. Greenstine v. Borchard*, 50 Mich. 434.

and it is equally well settled that even general words may protect against defects which, though known of or obviously in existence, are doubtful or uncertain in their nature, character or extent, where it appears that the purchaser chose to rely on the warranty rather than upon his own judgment.¹ As stated in one case: "Where there is uncertainty and difficulty, and the representation is not glaringly inconsistent with the obvious condition and quality of the property, or where the results of the known defect are not apparent at the time, and could not have been reasonably foreseen, the buyer may rely on the warranty or representation, and not on his own judgment."²

§ 1274. — **How determined.**— Whether the defect was thus so open and glaring that it could not be deemed to have been warranted against, and whether the buyer relied upon the warranty and not upon his own judgment, are usually facts for the jury to determine.³

¹In *Fletcher v. Young* (1882), 69 Ga. 591, there was a written warranty of a horse that he was "perfectly sound and without blemish," though it also stated that he now has "a cold or little distemper." The court held that the proper construction was that the horse was warranted sound notwithstanding the apparent cold or distemper, which subsequently proved to be more serious, and that the buyer might recover. Very similar in effect is the later case of *Perdue v. Harwell*, *supra*. In *Storrs v. Emerson* (1887), 72 Iowa, 390, 34 N. W. R. 176, the buyer of a horse called attention to suspicious symptoms which he feared were indicative of some disease though he did not know of what. The seller then expressly warranted the horse to be sound; it proved to be affected with spine and kid-

ney disease, and the buyer recovered.

And where, at the time of the sale, there is some difficulty apparent, but its nature and probable consequences are not readily discoverable, the buyer may rely on a general warranty of soundness and recover if the difficulty proves to be such as to constitute a breach of it. *Stucky v. Clyburn* (1840), Cheves (S. C.), L. 186, 34 Am. Dec. 590. "Especially is this so where the nature and extent of the disorder is lurking, and may reasonably be supposed to be more within the knowledge of the vendor than the vendee." *Branson v. Turner* (1883), 77 Mo. 489, citing *Thompson v. Botts*, 8 Mo. 710.

²*Thompson v. Harvey* (1888), 86 Ala. 519, 5 S. R. 825.

³*Thompson v. Harvey*, *supra*.

§ 1275. **Express warranty after inspection.**— Closely allied to the question discussed in the preceding section is that of the right of the purchaser to take and avail himself of an express warranty, notwithstanding an inspection of the goods. He cannot, of course, within the rules last stated, rely upon a warranty against such defects as are clearly obvious; but as to such defects as may be latent, there is now no question that he may take and enforce an express warranty, notwithstanding the fact that he may have personally examined the goods.¹ As stated in a recent case,² “a purchaser of an article may examine it for himself and exercise his own judgment upon it, and at the same time may protect himself by taking a warranty.”

§ 1276. **Limitations upon warranty.**— The parties may, of course, by express terms, limit or enlarge the construction which the law would naturally and ordinarily put upon the language they have used; and they may also by the context indicate that words or statements which would otherwise have been deemed to constitute a warranty were in this instance used with a different signification. Thus, where positive declarations concerning the qualities or characteristics of an article are coupled with an express warranty in terms respecting other qualities or characteristics, it will be presumed that both were not used with the same force and significance; and the general assertions, though otherwise sufficient to constitute a warranty, must here take subordinate rank to the words of express warranty, and will therefore be deemed to be mere representations.³

¹ *Smith v. Hale*, 158 Mass. 173, 33 N. E. R. 493, 35 Am. St. R. 485; *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. R. 455, 22 N. E. R. 47, 5 L. R. A. 213; *Miller v. Moore*, 83 Ga. 684, 20 Am. St. R. 329, 6 L. R. A. 374, 10 S. E. R. 360; *South Bend Pulley Co. v. Caldwell* (1900), — Ky. —, 55 S. W. R. 208.

² *Smith v. Hale*, *supra*, citing *Harrington v. Smith*, 138 Mass. 92.

³ In *Richardson v. Brown*, 1 Bing. 344, there was a sale of “a horse five years old; has been constantly driven in the plough; warranted;” and it was held that the warranty referred to soundness only. In *Budd v. Fairman*, 8 Bing. 48, the words were, “Received £10 for a gray four-year-old colt, warranted sound in every respect,” and the warranty was also confined to soundness. In *Dickenson v. Gapp*, quoted in 8 Bing. 50,

§ 1277. — **To the extent of seller's knowledge.**— So the seller may limit the extent of the warranty to his own knowledge upon the subject, as where he warrants qualities or characteristics to be of a certain sort so far as he knows; and in such a case there can be no recovery upon the warranty beyond the limit thus set to it.¹ He may likewise limit the warranty to that which was given him when he himself bought the goods; or he may simply recite or refer to such a warranty without adding his own responsibility to it.²

§ 1278. **Warranties by agents.**— The question of the power of agents to bind their principals by warranties depends upon a variety of considerations. If the agent has express authority to warrant, there will be little room for controversy, because here he may give all such warranties as the express authority, fairly construed, will justify. In the ordinary case, however, no express authority exists, and the question is whether power to warrant may be implied as an incident to or attribute of some other power with which the agent is clothed.

§ 1279. —. In dealing with this question, one or two fundamental propositions are to be kept in mind. Every delega-

the words were, "Received £100 for a bay gelding got by Cheshire Cheese, warranted sound;" there was held to be no warranty as to breed. In *Anthony v. Halstead*, 37 L. T. (N. S.) 433, the words were, "Received £60 for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon;" there was held to be no warranty that the horse was quiet to ride and drive.

¹ Thus, where the seller warrants that the article, *e. g.*, a horse, is sound so far as he knows, knowledge by the seller of the unsoundness must be shown before a recovery can be had. *Wood v. Smith*, 5 M. & R. 124;

Burnham v. Sherwood (1888), 56 Conn. 229, 14 Atl. R. 715.

So in *Wason v. Rowe* (1844), 16 Vt. 525, where the language was that a horse sold was "considered sound," the court said that "it would be putting a very liberal construction upon words and giving great latitude to construction to say that that was an *assertion* or *undertaking* that the horse was sound."

² Thus, in *Davis v. Iverson*, 5 S. Dak. 295, 58 N. W. R. 796, where there was a written bill of sale in which the seller expressly warranted the title to a horse sold, but recited that the importer of the horse warranted him to be a sure foal-getter, the latter was held to be no part of the seller's warranty.

tion of authority carries with it by implication, unless the contrary is declared, implied power to do all those things which are reasonably necessary and proper to carry into effect the main power so conferred.¹ Whenever a principal confers upon his agent authority to do an act, or to transact business of a nature, concerning which there is a well defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intention, that the authority was conferred in contemplation of the usage. Where, however, the usage is local and particular, this presumption would not arise unless the principal were shown to be acquainted with it.² And finally, where third persons have dealt with the agent in good faith, and in the exercise of reasonable prudence, in reliance upon the usual authority with which he was apparently clothed, they will be protected against any private limitations upon the agent's authority of which they were not informed.³

Applying these general principles, it may be noticed, first, that —

§ 1280. Agent's implied authority to warrant title.— An agent authorized to sell goods, as the goods of his principal, would have implied authority to warrant his principal's title. Warranties of this sort are usual, and would be implied if the principal himself were to offer for sale goods in his own possession; and if he authorizes the sale of the goods as his own, he doubtless thereby confers authority to make the warranty which the law would attach to his act if he sold in person.

§ 1281. Agent's implied authority to warrant quality.— So, authority conferred upon an agent, whether general or special, to sell personal property carries with it, in the absence of countervailing circumstances known to the party with whom he deals, implied power to make in the name of the principal such a warranty of the quality and condition of the property sold as is usually and ordinarily made in like sales of similar

¹ Mechem on Agency, § 280.

³ Mechem on Agency, § 281.

² Mechem on Agency, § 281.

property at that time and place.¹ Conversely, he may not warrant unless it is so usual.²

§ 1282. —. The question of what is usual in such a case is ordinarily a question of fact to be determined by the jury,³ but in certain cases the court will take judicial notice of it.⁴ The usage must be so well settled, notorious and continuous as to raise the legal presumption that it was known to buyer and seller and that the sale was made in reference to it.⁵ If it is purely local, the principal may rebut the presumption of knowledge by showing that, in fact, he did not know of it, in

¹ *Pickert v. Marston* (1887), 68 Wis. 465, 60 Am. R. 876, 32 N. W. R. 550; *Westurn v. Page* (1896), 94 Wis. 251, 68 N. W. R. 1003; *Fletcher v. Nelson* (1896), 6 N. Dak. 94, 69 N. W. R. 53; *Canham v. Piano Mfg. Co.* (1893), 3 N. Dak. 229, 55 N. W. R. 583; *Reese v. Bates* (1897), 94 Va. 321, 26 S. E. R. 865; *First National Bank v. Robinson* (1898), 105 Iowa, 463, 75 N. W. R. 334; *Wait v. Borne* (1890), 123 N. Y. 592, 25 N. E. R. 1053; *Ahern v. Goodspeed*, 72 N. Y. 108; *Talmage v. Bierhaue*, 103 Ind. 270; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. R. 4; *McAlpin v. Cassidy*, 17 Tex. 449; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Palmer v. Hatch*, 46 Mo. 585; *Huguley v. Morris*, 65 Ga. 666; *Deming v. Chase*, 48 Vt. 382; *Boothby v. Scales*, 27 Wis. 626; *Murray v. Brooks*, 41 Iowa, 45; *Tice v. Gallup*, 2 Hun (N. Y.), 446; *Smith v. Tracy*, 36 N. Y. 79; *Nelson v. Cowing*, 6 Hill (N. Y.), 336; *Hunter v. Jameson*, 6 Ired. (N. C.) L. 252; *Ezell v. Franklin*, 2 Sneed (Tenn.), 236; *Bradford v. Bush*, 10 Ala. 386; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Cooley v. Perrine*, 12 Vroom (N. J.), 322, 32 Am. R. 210; *Decker v. Fredericks*, 47 N. J. L. 469; *Scott v. McGrath*, 7 Barb. (N. Y.) 53; *Milburn v.*

Belloni, 34 id. 607; *Gaines v. McKinley*, 1 Ala. 446; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Cocke v. Campbell*, 13 Ala. 286; *Davis v. Burnett*, 4 Jones (N. C.), L. 71, 67 Am. Dec. 263; *Upton v. Suffolk Mills*, 11 Cush. (Mass.) 586. 59 Am. Dec. 163; *Graves v. Legg*, 2 Hurl. & N. 210; *Dingle v. Hare*, 7 C. B. (N. S.) 145; 97 Eng. Com. L. 145; *Alexander v. Gibson*, 2 Camp. 555; *Fay v. Richmond*, 43 Vt. 25; *Morris v. Bowen*, 52 N. H. 416; *Applegate v. Moffit*, 60 Ind. 104; *Randall v. Kehlror*, 60 Me. 37; *Croom v. Shaw*, 1 Fla. 211; *Williamson v. Canaday*, 3 Ired. (N. C.) L. 349; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Taggart v. Stanbery*, 2 McLean (U. S. C. C.), 543; *Woodford v. McClenahan*, 4 Giln. (Ill.) 85.

² *Bierman v. City Mill Co.* (1897), 151 N. Y. 482, 45 N. E. R. 856, 37 L. R. A. 799, 56 Am. St. R. 635; *Westurn v. Page* (1896), 94 Wis. 251, 68 N. W. R. 1003, and other cases cited in preceding note.

³ *Herring v. Skaggs*, *supra*; *Pickert v. Marston*, *supra*; *Reese v. Bates*, *supra*.

⁴ *Ahern v. Goodspeed*, *supra*; *Talmage v. Bierhaue*, *supra*.

⁵ *Herring v. Skaggs*, *supra*.

which case he will not be bound.¹ Proof of the usage is admissible in behalf of either party.²

§ 1283. —. If a warranty is usual, the fact that the agent was forbidden to warrant, or was authorized to give only a particular or a limited warranty, will not affect a purchaser who relied upon the usual powers in ignorance of the restriction.³

§ 1284. — Custom — Judicial notice.— In a New York case the court said it was within their judicial observation from many cases before them, that a warranty of commercial character was the usual accompaniment of a sale, upon the New York Stock Exchange, of promissory notes having the guise of commercial paper, and it was held that an agent authorized to sell such paper had implied power to make such a warranty.⁴

So the court will take judicial notice that it is usual and customary, in ordering goods of a dealer through his agent, to require a warranty of quality, where the goods are not present and subject to the inspection of the purchaser, and authority to make such a warranty will be implied.⁵

§ 1285. — Customary warranties on sales of machinery. Again, sales of implements and machinery by the manufacturers are so generally accompanied by a warranty of fitness for the purpose for which they are intended, that an agent commissioned to sell them will be presumed to have authority to make such a warranty,⁶ and evidence is not admissible to prove that it was not the custom of such a manufacturer to warrant, unless it also be shown that the purchaser had notice of that custom;⁷ nor that the agent was expressly prohibited to war-

¹ Pickert v. Marston, *supra*.

² Pickert v. Marston, *supra*.

³ Canham v. Plano Mfg. Co. (1893), 3 N. Dak. 229, 55 N. W. R. 583.

⁴ Ahern v. Goodspeed, 72 N. Y. 108, 114.

⁵ Talmage v. Bierhause, 103 Ind. 270.

⁶ McCormick v. Kelly, 28 Minn. 135, 9 N. W. R. 675 (a harvesting machine); Canham v. Plano Mfg. Co. (1893), 3 N. Dak. 229, 55 N. W. R. 583.

⁷ Murray v. Brooks, 41 Iowa, 45 (a reaping machine). See also Canham v. Plano Mfg. Co., *supra*.

rant, unless notice of such prohibition be brought home to the purchaser.¹

§ 1286. — So such an agent has implied power to sell upon trial and to give the purchaser the privilege of returning the machinery if not satisfactory;² and may sell upon condition that the sale shall not be consummated if the machine does not do good work;³ and having sold upon condition that if the machine does not prove satisfactory to the purchaser he shall return it, the agent may waive such return.⁴ He may also agree that, if a dissatisfied purchaser will retain and pay for the machine, he shall have a longer time for testing it than that fixed by the original contract.⁵

§ 1287. — **Sale by sample.**— An agent authorized to sell goods by sample will have the implied authority to make the warranty usual in such cases that the goods sold are equal to the sample.⁶

§ 1288. — **Authority limited to particular warranty.**— Evidence that the authority of the agent to warrant was limited to the giving of a printed warranty only furnished him by his principal is not admissible unless it be also shown that the purchaser had knowledge of the limitation;⁷ but where the purchaser has knowledge that such a warranty was furnished, he cannot accept an oral warranty from the agent different in its terms and require the principal to comply with such oral warranty.⁸

The fact that the vendor of a steam-boiler by his agent fur-

¹ Boothby v. Scales, 27 Wis. 626.

² Deering v. Thom, 29 Minn. 120.

³ Oster v. Mickley, 35 Minn. 245.

⁴ Pitsinowsky v. Beardsley, 37 Iowa, 9; Warder v. Robertson, 75 Iowa, 585, 39 N. W. R. 905.

⁵ Bannon v. Aultman (1891), 80 Wis. 307, 49 N. W. R. 967.

⁶ Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Dayton v. Hooglung, 39 Ohio St. 671; Schuchardt v. Allens,

1 Wall. (U. S.) 359; Murray v. Smith,

4 Daly (N. Y.), 277.

⁷ Murray v. Brooks, 41 Iowa, 45; Canham v. Plano Mfg. Co. (1893), 3 N. Dak. 229, 55 N. W. R. 583.

⁸ Wood Mowing & Reap. Machine Co. v. Crow, 70 Iowa, 340. limiting Eadie v. Ashbaugh, 44 Iowa, 519, and Farrar v. Peterson, 52 Iowa, 420.

But where an agent authorized to sell trees and make settlements with

nishes the vendee at the time of the sale with a pamphlet descriptive of the boilers, in which their durability is advertised as an essential quality, is evidence from which the agent's authority to warrant their durability may be inferred.¹

§ 1289. Limitations upon power to warrant — Unusual warranties.— But this rule, giving the agent power to make the usual warranties, is not to be extended beyond the limits prescribed by it. It cannot, therefore, apply to sales of property not usually sold with such a warranty, nor to sales made under such circumstances that such a warranty is not usually given, nor can it give countenance to any unusual or extraordinary warranty.

§ 1290. —. Thus, though an agent authorized to sell liquors may warrant their quality and condition, he has no implied power to warrant that they will not be seized for violation of the revenue laws;² nor can an agent employed to sell flour without express authority warrant that it will keep sweet during a sea voyage from Massachusetts to California.³

§ 1291. —. So an agent authorized to take orders for his principal's goods may warrant that the principal will not sell similar goods to any other dealer in the same town;⁴ but he cannot warrant that his principal will not sell to others afterwards goods for a less price.⁵ And though an agent employed to sell negotiable notes would have implied authority, when

the purchasers orally warranted the trees for four years, though the printed order signed by the purchaser was limited to one year, it was held that the agent had implied power at the time of settling with the purchaser to put into writing the warranty as to four years and thus bind his principal. *Griffith v. Field* (1898), 105 Iowa, 362, 75 N. W. R. 325. Where the purchaser is furnished with a printed warranty which expressly provides that the agent has

no authority to change or vary its terms, such provision is a sufficient notice to the purchaser of the limitations upon the agent's authority. *Furneaux v. Easterly*, 36 Kan. 530.

¹*Smilie v. Hobbs*, 64 N. H. 75, 5 Atl. R. 711.

²*Palmer v. Hatch*, 46 Mo. 585.

³*Upton v. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163.

⁴*Keith v. Hirschberg Optical Co.*, 48 Ark. 138, 2 S. W. R. 777.

⁵*Anderson v. Bruner*, 112 Mass. 14.

necessary, to indorse them, he would have no implied authority to make an additional guaranty of payment.¹

§ 1292. — Nor has an agent authorized to sell safes implied authority to warrant that they are burglar-proof.²

§ 1293. **Authority exhausted, when.**— After a completed and executed sale an agent authorized to sell and warrant has no implied power to rescind that sale, and thereupon make a new contract of sale with a new warranty. His power is exhausted upon its first complete execution.³ Neither has he implied power to warrant not only the goods he sells to a customer, but also all other goods that his principal may afterward sell to the same customer.⁴

§ 1294. **Authority to warrant soundness of horses.**— Whether an agent employed to sell a horse has implied power to warrant his soundness has been much discussed and the authorities are not harmonious. Thus it has been held that an agent of a horse dealer has 'such implied power, and that it cannot be affected by private instructions from the principal not to warrant;⁵ but that the agent of a private individual or a special agent has no such implied power, even in the absence of any restrictions.⁶ On the other hand, it has been decided that, unless expressly forbidden, the agent would have such an implied power;⁷ and in still other cases the authority has been declared in general terms.⁸

¹ *Graul v. Strutzel*, 53 Iowa, 712.

² *Herring v. Skaggs*, 62 Ala. 180, 34 Am. R. 4; s. c., 73 Ala. 446.

³ *Fletcher v. Nelson* (1896), 6 N. Dak. 94, 69 N. W. R. 53. So also *Brigham v. Hibbard* (1896), 28 Oreg. 386, 43 Pac. R. 383.

⁴ *Wait v. Borne* (1890), 123 N. Y. 592, 25 N. E. R. 1053.

⁵ *Howard v. Sheward*, L. R. 2 C. P. 148.

⁶ *Brady v. Todd*, 9 C. B. (N. S.) 592; *Cooley v. Perrine*, 12 Vroom (N. J.), 322, 32 Am. R. 210. The decision in

this case was based solely on the distinction between a general and a special agency.

⁷ *Deming v. Chase*, 48 Vt. 382; *Tice v. Gallup*, 2 Hun (N. Y.), 446.

⁸ *Ezell v. Franklin*, 2 Sneed (Tenn.), 236; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Lane v. Dudley*, 2 Murph. (N. C.) 119, 5 Am. Dec. 523; *Gaines v. McKinley*, 1 Ala. 446; *Helyear v. Hawke*, 5 Esp. 72; *Alexander v. Gibson*, 2 Camp. 555; *Bradford v. Bush*, 10 Ala. 386.

But no satisfactory reason is perceived why the question of the warranty of a horse should stand on any different basis than the warranty of any other chattel.¹

III.

IMPLIED WARRANTIES.

§ 1295. **Implied warranty defined.**— Express warranties have been seen to be those which arise from the direct and positive statements of the parties.² They may be said, therefore, to be created by the act of the parties. Implied warranties, on the other hand, are such as arise by operation of law, and an implied warranty may be defined as a contract or agreement which the law imputes to the seller by reason of the nature, circumstances or subject-matter of the contract of sale.³

§ 1296. **Implied warranty when express warranty exists.** Implied warranties can ordinarily arise only where the parties have not themselves created an express warranty relating to the same subject-matter, though this, as has been seen, is not an inflexible rule, and will yield to evidence that the parties intended both to operate, as where the express is clearly designed to be in addition to that which the law alone would imply.⁴

§ 1297. **Time and place of implied warranty.**— The time and place to which an express warranty shall be deemed to apply have already been considered in another place, but the same general rules are applicable here. Presumptively the time and place of the sale are the time and place referred to, but the presumption may be altered by the existence of facts showing that some other time or place was in the contemplation of the parties.

¹ See *Westurn v. Page* (1896), 94 Wis. 251, 68 N. W. R. 1003.

² See *ante*, § 1234.

³ *Osgood v. Lewis*, 2 H. & G. (Md.) 495, 18 Am. Dec. 317.

⁴ See *ante*, § 1259.

§ 1298. — Deterioration during shipment.—The implied warranty of merchantability, for example, ordinarily refers to the condition of the goods at the time and place of shipment, leaving the buyer to bear the consequences of the journey,¹ but it will be otherwise where the seller agrees to deliver the goods to the buyer at some particular place, in which case the seller must take the risk of any extraordinary or unusual deterioration, at least, though as to the necessary and usual consequences of the journey he will not be responsible unless he has agreed to be, or unless the necessary and usual incidents of the journey produce results which the seller ought reasonably to have guarded against.²

¹See *ante*, § 739. In *English v. Spokane Com. Co.*, 15 U. S. App. 218, 6 C. C. A. 416, 57 Fed. R. 451, where there was a sale of potatoes and eggs in carload lots to be delivered by the sellers on the track at Omaha, Nebraska, for shipment to Spokane Falls, Washington, it was held that the warranty of quality referred to their condition at Omaha, and that the sellers were not liable for deterioration necessarily resulting from the transit.

In *Mann v. Everton*, 32 Ind. 355, where there was a sale of corn meal for shipment from Indiana to New Orleans, it was held that there was an implied warranty that it was properly packed and fit for shipment, but that there was no warranty that it would continue sound for any particular length of time.

In *Leggat v. Brewing Co.*, 60 Ill. 158, where ale was sold for shipment south, it was held that the warranty applied only to its condition at the date of shipment and did not extend to its condition on arrival at its destination. Substantially to same effect is *Leopold v. Van Kirk*, 27 Wis. 152.

But in *Reynolds v. Palmer* (U. S. Cir. Ct.) 21 Fed. R. 433, Dick, J., in charging the jury held that, where there was a sale of tobacco at S. for shipment to W., to be there manufactured, a warranty that the tobacco would be delivered in "sound order" meant "such order as would, with ordinary care, insure the sound condition of the tobacco on its arrival at W., and for a reasonable time thereafter, when it could be used in the course of manufacture."

²In *Bull v. Robinson*, 10 Exch. 342, the plaintiff, an iron manufacturer in Staffordshire, agreed to manufacture and deliver to defendant in Liverpool, by canal and river transportation, a quantity of hoop-iron. Certain of the iron defendant refused to accept because of its alleged unmerchantable condition. It was proved that the iron was properly manufactured and was in good condition when put on board the boat in Staffordshire. There was evidence that the defects were incident to the shipment of iron by water at the time of year specified. The action was for the refusal to accept. Said the court, per Alderson, B.: "There

§ 1299. Implied warranties classified.—Implied warranties fall chiefly under one of two general heads: 1. Implied warranties of title; and 2. Implied warranties of quality; under

is no express warranty in the case; there is only that which is implied by law. Now, we have no doubt that the plaintiff was bound to manufacture merchantable hoop-iron; this, however, he did. We have no doubt, also, that he was bound to deliver the hoop-iron at Liverpool in a certain state and condition; but we think that hoop-iron to be manufactured in Staffordshire, and to be forwarded by canal and river, to be delivered in Liverpool, must be accepted by the vendee, if only so far deteriorated as all such iron must necessarily be deteriorated in its transit from Staffordshire to Liverpool. The law, we think, could never imply a warranty that the iron should be delivered in Liverpool, free from a deterioration without which iron well manufactured in Staffordshire could not be transferred from Staffordshire to Liverpool. Any warranty implied by the law must be a reasonable warranty, and cannot be one which it is physically impossible to comply with.

"If a man make an express contract to deliver at Liverpool hoop-iron in the very same condition as when first manufactured in Staffordshire, he must, of course, bear the consequence of his own unwise bargain; but we think there is no such contract implied in such a transaction as the present. We have no doubt that iron, and numerous other articles of manufacture in this country, are frequently manufactured upon orders from abroad, and to be delivered there by the manufacturer.

In such cases, to hold that the vendor, in the absence of an express warranty, was to be subjected to the risk arising from the necessary deterioration which every such voyage must produce upon the article, would, as it seems to us, lead to unjust consequences.

"A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration; but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from one place to the other, or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission."

In *Beer v. Walker*, 46 L. Jour. C. P. 677, plaintiff contracted to supply a retail dealer in another place with rabbits, to be sent by rail weekly. It was held that there was an implied warranty that the rabbits would be fit for food, and that this continued until in the ordinary course they arrived at their destination and the buyer had had a reasonable opportunity of dealing with them in the usual course of business.

In *Ryan v. Ulmer*, 108 Pa. St. 333, 56 Am. R. 210. where packed meat was sold in Iowa for shipment to Pennsylvania, the court assume the warranty of quality to have reference to its condition when shipped.

But in *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. R. 886, 54 Am. R. 30, where hams were sold in Iowa

the latter head being embraced such specific subjects as the implied warranty of conformity to sample, genuineness, identity, merchantability, and fitness for intended use.

1. *Implied Warranty of Title.*

§ 1300. Under what circumstances a warranty arises — In general.— The rule respecting the warranty of title implied upon the sale of a chattel cannot be said to be in a settled condition in the United States. Some points, however, are clear, and their statement will reduce to its lowest terms the point respecting which the uncertainty arises.

It is everywhere agreed that in the case of an *executory* agreement the seller warrants by implication the title to the goods which he agrees to sell.

It is also everywhere agreed that, in the sale of a specific and ascertained chattel, any affirmation by the seller that the chattel *is his* is equivalent to an express warranty of title; and that this affirmation may be *implied* from his conduct as well as from his words, and may also result from the nature and circumstances of the sale.

It is agreed also that if the seller, in such a case, though making no such express affirmation, nor selling under circumstances to raise an implication of such an affirmation, sells the chattel knowing that he has no title, and concealing that fact from the buyer, he is guilty of fraud.

But it is disputed whether, where no express warranty is given, the seller of a chattel does not, though acting in good faith, by the mere fact of sale, thereby impliedly warrant his title and ability to sell.

§ 1301. — The English rule.— Under the rules laid down in the earlier English authorities¹ it was unquestionably de-

for shipment to Mobile, Ala., and the seller took the bill of lading in his own name and retained control of the goods until they arrived at their destination, the warranty was held

to refer to their condition at Mobile, where, for the first time, the seller was ready to deliver them.

¹See Noy's Maxims, ch. 42; Coke on Lit. 102a; per Parke, B., in Mor-

clared that, where the seller is guilty of no fraud, he is not liable for a defective title unless there was an express warranty, or an equivalent to it, either by declarations or conduct: otherwise, *caveat emptor* was said to be the rule. It was admitted that a warranty might arise from such declarations or conduct, and the English courts, dissatisfied with the rule, proceeded to enforce and enlarge the warranty so arising until, as was asserted by Lord Campbell, the many exceptions had well nigh eaten up the rule. In a series of cases¹ ending with *Eichholz v. Bannister*, this process had been carried to such a degree that, in Mr. Benjamin's opinion, the older rule had been substantially altered, and he therefore stated what must undoubtedly be regarded as the modern English rule as follows: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."²

§ 1302. — **The rule in the United States.**—The English courts repudiate any distinction between those cases in which the seller is, and those in which he is not, in possession of the goods which he sells. This distinction has, however, been much urged in the United States. It seems universally to be conceded here that where the seller is in possession of the goods a warranty of title accompanies the sale, upon the ground that his undertaking to sell under such circumstances is of itself an affirmation of his title.³ But where he is not in

ley v. Attenborough, 3 Exch. 500; Speller, 14 Q. B. (Ad. & El.) 621, 68 Chitty's Contracts (11th ed.), 413; Eng. Com. L. 621, 19 L. J. Q. B. 239; Broom's Leg. Max. (5th ed.) 799-801; Sims v. Marryatt, 17 Q. B. (Ad. & El.) 281, 79 Eng. Com. L. 280, 20 L. J. Q. B. 454; Leake, Dig. Cont. 402; 2 Taylor, Ev. 984; Bullen & Leake, Prec. Pl. (1882), 342; Eichholz v. Bannister, 17 C. B. (N. S.) 708, 34 L. J. C. P. 105. See also

¹ Morley v. Attenborough, 3 Exch. 500, 18 L. Jour. Ex. 149; Hall v. Conder, 2 C. B. (N. S.) 22, 26 L. J. C. P. 138, 288; Smith v. Neale, 2 C. B. (N. S.) 67, 26 L. J. C. P. 143; Chapman v.

Raphael v. Burt, Cab. & El. 325.

² Benjamin on Sale (6th Am. ed.), § 639.

³ Defreeze v. Trumper, 1 Johns. (N. Y.) 274, 3 Am. Dec. 329; Chism v.

possession there are a few cases and numerous *dicta* asserting that no such warranty arises;¹ and this distinction has been said to be so deeply rooted in our jurisprudence that even if

Woods, Hard. (Ky.) 531, 3 Am. Dec. 740; Payne v. Rodden, 4 Bibb (Ky.), 304, 7 Am. Dec. 739; Chancellor v. Wiggins, 4 B. Mon. (Ky.) 201, 39 Am. Dec. 499; Scott v. Scott, 2 A. K. Marsh. (Ky.) 217; Perley v. Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; Lile v. Hopkins, 12 Smed. & M. (Miss.) 299, 51 Am. Dec. 115; Barton v. Faherty, 3 G. Greene (Iowa), 327, 54 Am. Dec. 503; Fawcett v. Osborn, 32 Ill. 411, 83 Am. Dec. 278; Morris v. Thompson, 85 Ill. 16; Burt v. Dewey, 40 N. Y. 283, 100 Am. Dec. 482; Matheny v. Mason, 73 Mo. 677, 39 Am. R. 541; Schell v. Stephens (1872), 50 Mo. 375 (auctioneers); Boston & Albany R. R. Co. v. Richardson (1883), 135 Mass. 473; Close v. Crossland (1891), 47 Minn. 500, 50 N. W. R. 694; Miller v. Van Tassel (1864), 24 Cal. 459; Gross v. Kierski (1871), 41 Cal. 111; Paulsen v. Hall (1888), 39 Kan. 365, 18 Pac. R. 225; Marshall v. Duke (1875), 51 Ind. 62; Thurston v. Spratt (1863), 52 Me. 202; Whitaker v. Eastwick (1874), 75 Pa. St. 229; Cohn v. Ammidown (1890), 120 N. Y. 398, 24 N. E. R. 944; Hunt v. Sackett (1875), 31 Mich. 18; Gookin v. Graham (1844), 5 Humph. (Tenn.) 480; Williamson v. Sammons (1859), 34 Ala. 691; Byrnside v. Burdett (1879), 15 W. Va. 702; Budd v. Power (1889), 8 Mont. 380, 20 Pac. R. 820; Jarrett v. Goodnow (1894), 39 W. Va. 602, 20 S. E. R. 575.

¹ Bennett's note to Benjamin, p. 633. Most of the cases in this country which adopt this rule do so on the authority of Chancellor Kent, who states the principle as follows: "In every sale of a chattel, if the possession be at the time in another, and

there be no covenant of warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article sold, and he sells as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." 2 Kent's Com. 478.

Huntingdon v. Hall, 36 Me. 501, 58 Am. Dec. 765 (citing 2 Kent's Com. 478; Morley v. Attenborough, 3 Exch. 512, per Parke, B., not now followed in England, and McCoy v. Artcher, *post*), is one of the few cases in a court of last resort which can be said to be a direct authority upon this question, and the authority upon which it rests has certainly been considerably shaken. Scott v. Hix, 2 Sneed (Tenn.), 192, 62 Am. Dec. 458, contains an assertion to the same effect, but the court also find that the seller did not intend to warrant nor did the buyer understand that there was any warranty. Long v. Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118, also states the rule in the same way, though it was clearly a mere *dictum*. Storm v. Smith, 43 Miss. 497, repeats the rule, but it was a guardian's sale, so that no warranty would be implied under any rule.

McCoy v. Artcher, 3 Barb. (N. Y.) 323, is much relied upon, and the court in terms declares the distinction as stated by Chancellor Kent, but the case itself is easily reconcilable with the English rule. It was the sale of an account, which, as the court held, carried with it as an incident a note which the seller never had seen nor had in his possession, and whose existence he denied, but which did in

erroneous it could not easily be eradicated.¹ The cases, however, which can be regarded as direct authority for the distinction are exceedingly few, and the tendency to break away from it is so strong that it is conceived that it can safely be

fact exist. The question was whether there was an implied warranty of title to the note. It was held that there was not, but this conclusion must have been reached under any rule, as the circumstances showed clearly that there was no intention to declare title to that which the seller believed not to exist.

Edick v. Crim, 10 Barb. 445, is also cited to the same effect, but there the buyer knew that the seller had no title.

Hopkins v. Grinnell, 28 Barb. 533, is also cited, but there the buyer knew the circumstances, and the court held he could not have recovered even if there had been an express warranty.

Scranton v. Clark, 39 N. Y. 220, 100 Am. Dec. 430, also lays down the rule on the authority of these cases in *Barbour's Reports*, and is doubtless entitled to be considered as an authority in point, though the decision could well have been put on other grounds. There A had been the owner of a promissory note made by B to E, who had indorsed it to A before maturity. After maturity A indorsed and delivered it to C. The next year A sold to D a lot of notes, and A and D both mistakenly supposed this note was among them. While affairs were in this situation, B paid the amount of the note to D and got a receipt, but the note, of course, was not surrendered. C, who had held the note all this time, then transferred it back to A. A transferred it to E, who transferred it to F, who brought suit upon it against

B. Defense, payment. It was insisted that, though A had no title or possession when he supposed he sold the note to D (to whom B paid the amount), still there was a warranty of title implied, and, as he subsequently acquired title and possession, this title inured under the warranty to D, making him the owner retrospectively when B paid to D, and therefore extinguishing the note. The court held that, as A was not in possession at the time of the supposed transfer to D, there was no warranty of title implied, and therefore no subsequently-acquired title inured to D, and therefore D was not the owner when B paid him the money, and therefore the note was not paid. [But, as suggested by Mr. Bennett, would the result be different if there had been an express warranty of title? As between a transferee with delivery and one without, which would get the better title? See *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57.]

Byrnside v. Burdett, 15 W. Va. 702, repeats the distinction, but it is clear, as the court admits, that, though not expressly testified to, the seller was in possession. *Lowman v. Excelsior Stove Pattern Co.* (1893), 104 Ala. 367, 16 S. R. 17, and *Lackey v. Stouder*, 2 Ind. 376, also quote Kent's rule, apparently with approval.

¹ Story on Sales (4th ed.), § 367, note. But in *Shattuck v. Green*, 104 Mass. 42, Morton, J., says: "It is a general rule of law in this country that in a sale of chattels a warranty is im-

asserted that the modern rule in the United States practically repudiates the distinction and places itself in accord with the later English rule as stated by Mr. Benjamin, namely, that where the seller, whether in or out of possession, purports to sell an absolute title, the warranty of title will attach.

§ 1303. — To what classes of goods the rule applies.— But whatever may be the cases in which the warranty of title arises, it extends where it does arise to sales of personal property of all kinds, including stocks, securities and all choses in action as well as chattels in possession.¹

plied unless the circumstances are such as to give rise to a contrary presumption. 1 Smith, Lead. Cas. (6th Am. ed.) 242; 1 Parsons on Contracts (5th ed.), 576, and cases cited. If the vendor has either actual or constructive possession, and sells the chattels, and not merely his interest in them, such a sale is equivalent to an affirmation of title, and a warranty is implied. In *Whitney v. Heywood*, 6 Cush. (Mass.) 82, 86, Dewey, J., says: 'Possession here must be taken in its broadest sense,' and 'the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty is implied.' The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells goods thus held as his, a warranty of title is implied. *Hubbard v. Bliss*, 12 Allen (Mass.), 590; *Cushing v. Breed*, 14 Allen, 376." *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. R. 64, *Adam's Cases on Sales*, 359, discusses the matter elaborately and adopts this view, though it is probably *dictum*.

¹Thus, the rule applies to United States bonds (*Raphael v. Burt*, Cab. & El. 325); to a land warrant (*Boyd v. Anderson*, 1 Overt. (Tenn.) 438, 3 Am. Dec. 762); to a certificate of scrip-dividend (*Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. R. 523); to accounts (*Gilchrist v. Hilliard*, 53 Vt. 592, 38 Am. R. 706); to partnership interest (*Jamison v. Harbert*, 87 Iowa, 186, 54 N. W. R. 75); to the right to manufacture and sell a proprietary article (*Costigan v. Hawkins*, 22 Wis. 74, 94 Am. Dec. 583); to a patent right (*Krumthaar v. Birch*, 83 Pa. St. 426); to a note (*Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141, 33 Am. Dec. 188); to corporate stock (*State v. Railroad Co.*, 34 La. Ann. 947); to corporate bonds (*Utley v. Donaldson*, 94 U. S. 29); to municipal bonds (*Richardson v. Marshall County* (1898), 100 Tenn. 346, 45 S. W. R. 440). [He also warrants the bonds to be genuine, but he does not warrant that they are valid in law, or that the municipality is solvent. *Richardson v. Marshall County*, *supra*; *Ruohs v. Third Nat. Bank* (1894), 94 Tenn. 57, 28 S. W. R. 303.] See also, to same effect: *Swanzy v. Parker*, 50 Pa. St. 441; *Flynn v. Allen*,

§ 1304. — Warranty of title protects against incumbrances.— The warranty of title which is implied is a warranty as to the *whole* title, and it therefore protects against partial defects, liens, charges and incumbrances by which the title transferred is rendered anything less than full, perfect and unincumbered.¹

§ 1305. — Subsequently-acquired title inures to benefit of buyer.— But though the seller had no title at the time of the sale, yet, if there be an implied warranty and the seller subsequently acquires the title, it will inure to the benefit of the purchaser,² or those who represent him.³

§ 1306. — Warranty implied on exchange of property. The implication of a warranty of title is not confined to sale technically so considered, but extends also to an exchange

57 Pa. St. 492; *Baker v. Arnot*, 67 N. Y. 448; *Chambers v. Union Nat. Bank*, 78 Pa. St. 205.

¹ The implied warranty of title is broken by the existence of an outstanding mortgage. *Close v. Crossland*, 47 Minn. 500, 50 N. W. R. 694; *Hall v. Aitkin*, 25 Neb. 360, 41 N. W. R. 192; *Hickman v. Dill*, 39 Mo. App. 246; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. R. 941, 17 L. R. A. 545.

An outstanding patent limiting right to use the article sold is also a breach. *Siegel v. Brooke*, 25 Ill. App. 207.

In a sale of personal property there is an implied warranty of the purchaser's uninterrupted right to use the article purchased—an implied warranty against eviction by a third person having a valid patent covering the article. *Electro Dynamic Co. v. The Electron* (1896), 74 Fed. R. 689, 21 C. C. A. 12, 45 U. S. App. 16.

But mere notice from a third per-

son that he claims an infringement of his patent is not of itself a breach of the warranty. *American Electrical Constr. Co. v. Consumers' Gas Co.*, 3 U. S. App. 111, 1 C. C. A. 663, 50 Fed. R. 778.

One who manufactures and sells stove patterns according to the selection of the purchaser does not impliedly warrant that no part of a stove made according to the pattern is subject to a patent. *Lowman v. Excelsior Stove Pattern Co.* (1893), 104 Ala. 367, 16 S. R. 17.

² *Kane v. Loder* (1897), 56 N. J. Eq. 268, 38 Atl. R. 966; *Hickman v. Dill*, 39 Mo. App. 246; *Sherman v. Transportation Co.*, 31 Vt. 162; *Maskelinski v. Wazsineski*, 48 N. Y. S. R. 407; *Gookin v. Graham*, 5 Humph. (Tenn.) 480. See also, that, where there is no implied warranty, the subsequently-acquired title will not inure, *Scranton v. Clark*, 39 N. Y. 220, 100 Am. Dec. 430.

³ *E. g.*, his receiver. *Kane v. Loder*, *supra*.

or barter of chattels,¹ and to the case of payment in chattels of some prior debt or obligation.²

§ 1307. — **No implied warranty of title in official sales, etc.**— The implied warranty of title being predicated upon the fact that the seller, under the circumstances, stands in the attitude of owner of the chattels which he sells, there can obviously be no such implication when he professedly sells not in his own right as owner but in some special, official or fiduciary capacity, or in the right of another.³ There is therefore no warranty of title implied where the seller acts as sheriff,⁴ administrator or executor,⁵ guardian,⁶ assignee in bankruptcy,⁷ mortgagee,⁸ and the like. Such a person may, of course, create an express warranty by positive affirmations respecting title, but in the absence of such affirmations no warranty will be implied.⁹

§ 1308. — **None where seller is known to be mere agent.** It has been seen in a preceding section that an agent may warrant the title of his principal to the goods he sells;¹⁰ and such a warranty would doubtless be implied on the part of the principal where he authorizes the sale of goods by an agent.

A person who assumes to be agent when he is not, or who exceeds his authority as such, or who conceals the fact of his agency or the name of his principal, ordinarily makes himself

¹ Hunt v. Sackett, 31 Mich. 18; Patee v. Pelton, 48 Vt. 182; Byrnside v. Burdett, 15 W. Va. 702; Close v. Crossland, 47 Minn. 500, 50 N. W. R. 694.

² Gaylor v. Copes, 16 Fed. R. 49.

³ See *ante*, §§ 190–196; Mechem on Public Officers, § 809; Cooley on Taxation (2d ed.), 476, 553.

⁴ Herman on Executions, § 214, citing many cases; Bassett v. Lockard, 60 Ill. 164; Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Neal v. Gillaspay, 56 Ind. 451. Constable: Robinson v. Cooper, 1 Hill (S. C.), 286.

United States marshal: The Monte Allegre, 9 Wheat. (U. S.) 616.

⁵ Woerner on Administration, § 484; Brandon v. Brown, 106 Ill. 519; Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Sparks v. Messick, 65 N. C. 440.

⁶ Woerner on Guardianship, § 88; Storm v. Smith, 43 Miss. 497.

⁷ Johnson v. Laybourn, 56 Minn. 332, 57 N. W. R. 933.

⁸ Harris v. Lynn, 25 Kan. 281, 37 Am. R. 253; Cohn v. Ammidown, 120 N. Y. 398, 24 N. E. R. 944.

⁹ See Mechem on Public Officers, §§ 809, 810.

¹⁰ See *ante*, § 1280.

personally liable;¹ and he does this also if he expressly charges his own personal responsibility;² but there is always a presumption that an agent, known to be such, intends to bind his principal and not himself,³ and therefore, where a known agent sells goods of his principal, no warranty of title on the part of the agent will be implied.⁴

§ 1309. — None where circumstances negative the presumption.—The implied warranty of title being one which the law imputes to the seller by reason of the circumstances under which the sale was made, and in furtherance of good faith, it follows necessarily that if those circumstances are absent, or if, though certain of them are present, there are others which show more clearly that the implied warranty was excluded, or that good faith does not require it, it will not arise. If, therefore, the seller expressly refuses to warrant the title and the buyer agrees to take his chances;⁵ or if the seller expressly sells simply such interest as he has;⁶ or if the origin and character of the seller's title are fully known to the buyer and the seller simply parts with whatever title he himself acquired,⁷—in these and like cases, for obvious reasons, no warranty will be implied.

2. *Implied Warranties of Quality.*

§ 1310. In general.—Having now considered the question of implied warranties of title it remains to ascertain what warranties, if any, are implied respecting the quality, condition,

¹ See Mechem on Agency, §§ 541–554.

² See Mechem on Agency, § 554.

³ See Mechem on Agency, § 558.

⁴ *Irwin v. Thompson* (1882), 27 Kan. 643.

⁵ *Miller v. Van Tassel*, 24 Cal. 458; *Porter v. Bright*, 82 Pa. St. 441.

⁶ *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. R. 64, *Adam's Cas.* 359 [citing *Hoagland v. Hall*, 38 N. J. L.

351; *First National Bank v. Massachusetts Co.*, 123 Mass. 330; *Bogert v. Chrystie*, 24 N. J. L. 57]; *Croly v. Pollard*, 71 Mich. 612, 39 N. W. R. 853.

⁷ *Chapman v. Speller*, 14 Q. B. 621; *Hopkins v. Grinnell*, 28 Barb. (N. Y.) 533; *Bagueley v. Hawley*, L. R. 2 C. P. 625; *Hall v. Conder*, 2 Com. B. (N. S.) 22.

fitness or characteristics of the goods sold. Though differing somewhat in aspect, these matters may all be appropriately grouped under the single head of warranties of quality, and they will be so considered. And in so doing it will be convenient first to ascertain what is the general rule as to such an implication, and then what exceptions exist, if any.

a. Caveat Emptor.

§ 1311. **No warranty implied on sale of ascertained chattel open to inspection.**—It is the well settled and general rule of the common law, differing in this respect from the civil law, that, upon the present and executed sale of a definite, ascertained and existing chattel which is open to the inspection of the buyer, and of which the seller is neither the manufacturer nor the grower, no warranty whatever as to quality, fitness or condition is implied. In such cases, unless there is fraud or the seller gives an express warranty, the rule of the common law is practically without exception that the buyer purchases at his own risk. *Caveat emptor* is the invariable maxim.¹ If the

¹**Caveat emptor—The common-law maxim.**—Springwell v. Allen, 2 East, 448, n.; Parkinson v. Lee, 2 East, 314; Williamson v. Allison, 2 East, 446; Earley v. Garrett, 9 B. & C. 928; Morley v. Attenborough, 3 Ex. 500; Ormrod v. Huth, 14 M. & W. 651; Hall v. Conder, 2 C. B. (N. S.) 22; Hopkins v. Tanqueray, 15 C. B. 130; Chanter v. Hopkins, 4 M. & W. 399; Swett v. Colgate, 20 Johns. 196, 11 Am. Dec. 266; Welsh v. Carter, 1 Wend. (N. Y.) 185, 19 Am. Dec. 473; Mixer v. Coburn, 11 Metc. (Mass.) 559, 45 Am. Dec. 230; Frazier v. Harvey, 34 Conn. 469; Hadley v. Clinton Co. Imp. Co., 13 Ohio St. 502, 82 Am. Dec. 454; Lord v. Grow, 39 Pa. St. 88, 80 Am. Dec. 504; Moore v. McKinlay, 5 Cal. 471; Moses v. Mead, 1 Denio (N. Y.), 378, 43 Am. Dec. 676; Hart v. Wright, 17 Wend. (N. Y.) 267; Wright v. Hart, 18 Wend. 449; Lanier v. Auld, 1 Murph. (N. C.) 138, 3 Am. Dec. 680; Erwin v. Maxwell, 3 Murph. 241, 9 Am. Dec. 602; Hyatt v. Boyle, 5 G. & J. (Md.) 110, 25 Am. Dec. 276; Getty v. Rountree, 2 Pin. (Wis.) 379, 54 Am. Dec. 138; Dickson v. Jordan, 11 Ired. (N. C.) L. 166, 53 Am. Dec. 403; Barnard v. Kellogg, 10 Wall. (U. S.) 383; Weimer v. Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Sellers v. Stevenson, 163 Pa. St. 262, 29 Atl. R. 715; Rice v. Forsyth, 41 Md. 389; Hight v. Bacon, 126 Mass. 10, 30 Am. R. 639; Kohl v. Lindley, 39 Ill. 195, 89 Am. Dec. 294; McCray Refrig. Co. v. Woods, 99 Mich. 269, 58 N. W. R. 320, 41 Am. St. R. 599; Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. R. 513; Milwaukee Boiler Co.

buyer wishes further protection than his own inspection or judgment can give him, he must exact a warranty.

§ 1312. — Mere inconvenience of examination does not affect rule.—The rule is not altered by the fact that the examination or inspection will consume time or is attended with labor and inconvenience. No exception to it can be admitted, to use the language of a leading case, except “where the examination at the time of the sale is, morally speaking, impracticable, as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience or labor is not equivalent to its impracticability. If the purchaser desire to avoid it, and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality.”¹

§ 1313. — No implied warranty of quality as to obvious defects.—There is clearly, therefore, no implied warranty against obvious defects. Neither, ordinarily, is there one as to latent defects, as will be seen in a subsequent section.

§ 1314. No implied warranty, in such cases, even though seller knew that chattel was bought for a specific purpose.—It makes no difference ordinarily, in the application of the rule of *caveat emptor* (though it is material in other cases to be hereafter noticed²), that the seller knew that the buyer intended the chattel for a specific purpose to which he erroneously sup-

v. Duncan, 87 Wis. 120, 58 N. W. R. 232, 41 Am. St. R. 33; Smith v. Love, 64 N. C. 439; Kingsbury v. Taylor, 29 Me. 508, 50 Am. Dec. 607; Fogle v. Brubaker, 122 Pa. St. 7, 15 Atl. R. 692; Hood v. Bloch, 29 W. Va. 244; Hoffman v. Oates, 77 Ga. 701; Warren Glass Works v. Coal Co., 65 Md. 547, 5 Atl. R. 253; Horner v. Parkhurst, 71 Md. 110, 17 Atl. R. 1027; Bartlett v. Hoppock, 34 N. Y. 118, 88 Am. Dec. 428; Armstrong v. Bufford,

51 Ala. 410; Carleton v. Jenks, 47 U. S. App. 734, 26 C. C. A. 265; Court v. Snyder (1891), 2 Ind. App. 440, 50 Am. St. R. 247.

Caveat venditor—The civil-law maxim.—See Meyer v. Richards, (1895), 163 U. S. 385, 398.

¹ Hyatt v. Boyle, 5 Gill & J. (Md.) 110, 25 Am. Dec. 276. To same effect is the language of Davis, J., in Barnard v. Kellogg, 10 Wall. (U. S.) 383.

² See *post*, § 1343.

posed it to be adapted; for here the buyer relies on his own judgment and not on the judgment of the seller.¹

¹ Thus in *Dickson v. Jordan*, 11 Ired. L. (N. C.) 166, 53 Am. Dec. 403, the court said: "The purpose for which an article is intended is known in almost every case, and the accident that it happens to be expressed, unless it enters into and forms a part of the bargain, can make no difference. One buys a set of harness, for instance. Can it make any difference if he happens to say that his purpose is to use them for his carriage? The purpose is known whether he says so or not, and the price is the same. Where, then, is the consideration to support this implied warranty? What does he pay for it? The case would be different if he should tell the merchant that his carriage was particularly heavy, or his horses unruly, and he was willing to pay a higher price to have the article warranted to be strong and fit for his purpose." In *Hight v. Bacon*, 126 Mass. 10, 30 Am. R. 639, a leather dealer, not the manufacturer, sold to another dealer a specific quantity of leather which the latter examined. The seller knew that the buyer intended it to be made into boots and shoes, for which it proved to be unfit by reason of a latent defect, though both parties at the time of the sale believed it to be suitable. *Held*, there was no warranty of fitness for the purpose contemplated.

In *Shisler v. Baxter*, 109 Pa. St. 413, 58 Am. R. 738, it appeared that in 1881 plaintiff had bought of defendant, a seed merchant, a quantity of Wakefield cabbage seed which gave good results. The next year plaintiff asked defendant if he had "any more Wakefield cabbage seed, same

as in 1881." Defendant produced what he had left of the stock of 1881, in the identical packages of that year; plaintiff examined it and bought it, but it failed to produce Wakefield cabbage and was almost worthless. *Held*, there was no implied warranty.

In *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. R. 705, 39 Am. St. R. 864, 22 L. R. A. 187 (with valuable note), plaintiff bought of defendants a bull which they knew plaintiff desired for breeding purposes. Plaintiff saw and examined the bull before the purchase, and there was no express warranty. The bull proved to be impotent, of which both parties were ignorant at the time of the sale. *Held*, that there was no implied warranty of fitness. *Taylor v. Gardiner*, 8 Manitoba, 310, and *Wood v. Ross*, — Tex. Civ. App. —, 26 S. W. R. 148, held the same way respecting a stallion; (but *Merchants' Bank v. Frazee* 9 Ind. App. 161, 36 N. E. R. 378, where the court likened it to an executory contract, and the buyer relied on the seller's judgment [see *post*, § 1313] is *contra*.) *Scott v. Renick*, 1 B. Mon. (Ky.) 63, 35 Am. Dec. 177, holds the same way respecting a cow, and *White v. Stelloh*, 74 Wis. 435, 43 N. W. R. 99, accords respecting the future competency of a bull-calf.

See also that on a sale of specific article, mere knowledge of seller's purpose raises no warranty of fitness, *Bragg v. Morrill*, 49 Vt. 45, 24 Am. R. 102; *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428; *Deming v. Foster*, 42 N. H. 165; *Mason v. Chappel*, 15 Gratt. (Va.) 572; *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Rogers v. Niles*, 11 Ohio St. 48, 78

§ 1315. — The distinction which exists here was well stated in a New Hampshire case,¹ often cited, in this way: "In the case of executory contracts for the making or furnishing of goods or articles for a special use, the law implies a contract that the articles to be made or furnished shall be reasonably fit and proper for the use for which they are ordered. And when articles thus agreed to be made or furnished are delivered, the law implies a warranty that the articles are reasonably fit and proper for that use.

"But there is no implied warranty as to the quality of an article sold, nor of its fitness for any particular use, where there is a present sale of a particular existing article, then open to the examination and inspection of the purchaser, and where he requires no express warranty. To use the illustration of Maule, J., in *Keates v. Cadogan*,² if a man says to another, 'Sell me a horse fit to carry me,' and the other sells him a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that grey horse to ride,' and the other sells it, knowing that he cannot ride it, that would not make him liable."

§ 1316. — Or that the defect be latent.— Neither does it make any difference in the application of this rule that the defect was latent, and not discoverable on examination, if the seller (not the manufacturer or grower³) is guilty of no fraud. As was said by Mellor, J., in the leading case of *Jones v. Just*:⁴ "Where goods are *in esse*, and may be inspected by the buyer,

Am. Dec. 290; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. R. 150; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. R. 359; *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.), 52; *Rasin v. Conley*, 58 Md. 59; *Port Carbon Co. v. Groves*, 68 Pa. St. 149; *Gachet v. Warren*, 72 Ala. 288; *Warren Glass Works v. Coal Co.*, 65 Md. 547, 5 Atl. R. 253; *McCray Refrigerator Co. v. Woods*, 99 Mich. 269, 58 N. W. R. 320, 41 Am. St. R. 599; *Milwaukee*

Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. R. 232; *Seitz v. Refrigerating Co.*, 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. R. 46; *Ottawa Bottle Co. v. Gunther*, 31 Fed. R. 209; *Dounce v. Dow*, 64 N. Y. 411.

¹ *Deming v. Foster* (1860), 42 N. H. 165.

² 10 C. B. 591.

³ As to this, see following section.

⁴ L. R. 3 Q. B. 197.

and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer.¹ The buyer in such a case has the opportunity of exercising his judgment upon the matter, and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty."

§ 1317. — Unless the seller of goods with latent defects is the manufacturer or grower.— Where, however, the seller is the manufacturer or grower, a somewhat different rule applies. Usually the question arises in the case of the executory contract by the manufacturer or grower, or even a dealer to supply, according to his own judgment, an article to suit the buyer's need as disclosed to him; and this aspect of the subject is considered in a later section.²

But even in the case of the present sale of a specific chattel by the manufacturer or producer there is an implied warranty against latent defects growing out of the process of manufacture or production, of which defects the buyer was ignorant, which were not open to such observation as it was practicable for him to make, and which would render the article unfit for the use for which the seller knew it was designed, or unmerchantable, as the case may be.³

¹Citing *Parkinson v. Lee*, 2 East, 314. To like effect: *White v. Stelloh* (1889), 74 Wis. 435, 43 N. W. R. 99; *Snelgrove v. Bruce* (1866), 16 Up. Can. C. P. 561; *Court v. Snyder* (1891), 2 Ind. App. 440, 50 Am. St. R. 247. So in *White v. Oakes* (1896), 88 Me. 367, 34 Atl. R. 175, 32 L. R. A. 592, the seller of a folding bed, not the manufacturer of it, was held not liable on any implied warranty, where the bed was defectively designed, but this defect was not observable until use, and the seller was ignorant of it.

²See *post*, § 1343.

³In *Kellogg Bridge Co. v. Hamilton* (1883), 110 U. S. 108, the Bridge Company had taken the contract for the construction of a railroad bridge, and had partially constructed it, when the company entered into a subcontract with Hamilton to finish the bridge. By the contract Hamilton was to take and pay for certain "false-work" already erected by the company for use in constructing the bridge. This "false-work" contained defects of construction not open to observation, and not discoverable by ordinary methods. When Hamilton

§ 1318. — “In ordinary sales,” it is said by the supreme court of the United States,¹ “the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon ground of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently the buyer in such cases — the seller giving no express warranty and making no representations tending to mislead — is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as compe-

came to use it for the purpose for which it was constructed and sold to him, it gave way and caused him much loss, and the action, *inter alia*, was for damages for this loss. It was held, in the line of reasoning quoted in the following section, that there was practically a sale, and that the law “implies a warranty that this false-work was reasonably suitable for such use as was contemplated by both parties.” The court cited *Brown v. Edgington*, 2 Man. & Gr. 279; *Shepherd v. Pybus*, 3 Man. & Gr. 868; *Jones v. Just*, L. R. 3 Q. B. 197; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Leopold v. Van Kirk*, 27 Wis. 152; *Brenton v. Davis*, 8 Blackf. (Ind.) 317.

Most of these cases were cases of executory contracts and are cited in the subsequent sections devoted to that subject. *Brenton v. Davis*, how-

ever, was the case of the sale of a specific boat, but at the time of the sale it was lying in the river partly filled with water and leaves. The seller was the maker. There was evidence of express representations concerning the boat, but the court said that if a manufacturer sells an article knowing that the purchaser intended to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose, and “if, owing to some defect in the article not visible to the purchaser, it is unfit for the purpose for which it is sold and bought, the seller is liable on his implied warranty.”

The recent cases on the extent of the warranty against latent defects in the case of executory contracts are collected in the note to § 1346.

¹ *Kellogg Bridge Co. v. Hamilton*, *supra*.

tent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

§ 1319. — No warranty of soundness from payment of sound price.—It is likewise immaterial in these cases that the buyer paid what would be the full price of a sound, fit or appropriate article. The rule in this respect, as it is usually stated, is that no warranty is implied from the payment of a sound price on the executed sale of a specific chattel.¹ The South Carolina courts alone² deny this rule, which otherwise prevails in the United States and England.

b. Of Conformity to Sample.

§ 1320. On sale by sample, warranty implied that bulk is equal to sample in quality.—One of the first and most generally recognized exceptions to the rule of *caveat emptor* is that

¹Moses v. Mead, 1 Denio (N. Y.), 378, 43 Am. Dec. 676; Dean v. Mason, 4 Conn. 428, 10 Am. Dec. 162; Johnston v. Cope, 3 H. & J. (Md.) 89, 5 Am. Dec. 423; Warren Glass Works v. Coal Co., 65 Md. 547, 5 Atl. R. 253; Court v. Snyder (1891), 2 Ind. App. 440, 50 Am. St. R. 247.

²Timrod v. Shoolbred, 1 Bay, 324, 1 Am. Dec. 620; Whitefield v. McLeod, 2 Bay, 380, 1 Am. Dec. 650;

Smith v. McColl, 1 McCord, 220, 10 Am. Dec. 666; Bulwinkle v. Cramer, 27 S. C. 376, 3 S. E. R. 776. 13 Am. St. R. 645, where it is said that in that State a "sound price requires sound property." It was also denied in an early Connecticut case (Bailey v. Nickols, 2 Root, 407, 1 Am. Dec. 83), but this decision was soon afterwards overruled. Dean v. Mason, 4 Conn. 428, 10 Am. Dec. 162.

which is known as a sale by sample. A sale by sample arises where the seller exhibits a specimen of goods not open to inspection for the purpose of showing their quality to the buyer, and the parties deal upon the basis of the sample, which for the purposes of the negotiation is treated as the representative of the goods. The exhibition of the sample under these circumstances and for this purpose amounts to an affirmation on the part of the seller that the sample is a fair representation of the quality of the bulk, and the warranty arising, as has been frequently pointed out,¹ is perhaps more correctly to be regarded as an express than an implied one. It is, however, so commonly classed among the implied warranties that it will be so dealt with here, and the warranty which the law implies may be declared to be that the bulk is equal to the sample in quality, kind and nature.²

¹ As in *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122, where Parker, C. J., says that "a sale by sample is tantamount to an express warranty that the sample is a true representative of the kind." In *Vanderhost v. MacTaggart*, 1 Brev. (S. C.) 269, 2 Am. Dec. 667, it is said that in cases of sale by sample "there is an express warranty." It is so described, also, in *Gurney v. Railroad Co.*, 58 N. Y. 358.

² *Parker v. Palmer* (1833), 4 B. & Ald. 387; *Carter v. Crick* (1859), 4 H. & N. 412; *Bradford v. Manly* (1816), 13 Mass. 139, 7 Am. Dec. 122; *Dickinson v. Gay* (1863), 7 Allen (Mass.), 29, 83 Am. Dec. 656; *Williams v. Spafford* (1829), 8 Pick. (Mass.) 250; *Pike v. Fay* (1869), 101 Mass. 134; *Atwater v. Clancy* (1871), 107 Mass. 369; *Gould v. Stein* (1889), 149 Mass. 570, 22 N. E. R. 47, 14 Am. St. R. 455, 5 L. R. A. 213; *Oneida Mfg. Society v. Lawrence* (1825), 4 Cow. (N. Y.) 440; *Gallagher v. Waring* (1832), 9 Wend. (N. Y.) 20; *Boorman v. Jenkins* (1834),

12 Wend. 566, 27 Am. Dec. 158; *Waring v. Mason* (1837), 18 Wend. 425; *Beirne v. Dord* (1851), 5 N. Y. 95, 55 Am. Dec. 321; *Moses v. Mead* (1845), 1 Denio (N. Y.), 378, 43 Am. Dec. 676; *Sands v. Taylor* (1810), 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; *Andrews v. Kneeland* (1826), 6 Cow. (N. Y.) 354; *Beebee v. Robert* (1834), 12 Wend. 413, 27 Am. Dec. 132; *Gurney v. Atlantic, etc. Ry. Co.* (1874), 58 N. Y. 358; *Foot v. Bentley* (1870), 44 N. Y. 166, 4 Am. R. 652; *Hargous v. Stone* (1851), 5 N. Y. 73; *Leonard v. Fowler* (1871), 44 N. Y. 289; *Magee v. Billingsley* (1842), 3 Ala. 679; *Brigham v. Retelsdorf* (1887), 73 Iowa, 712, 36 N. W. R. 715; *Home Lightning Rod Co. v. Neff* (1882), 60 Iowa, 138, 14 N. W. R. 216; *Myer v. Wheeler* (1884), 65 Iowa, 390, 21 N. W. R. 692; *Hanson v. Busse* (1867), 45 Ill. 496, and note; *Webster v. Granger* (1875), 78 Ill. 230; *Merriman v. Chapman* (1864), 32 Conn. 146; *Gill v. Kaufman* (1876), 16 Kans. 571; *Brantley v. Thomas* (1858), 22 Tex. 270, 73 Am. Dec. 264; *Whitaker*

§ 1321. — **What constitutes a sale by sample.**— In order to give rise to the warranty of conformity it must appear that the sale was really made upon the basis of the sample; for not every case in which a specimen is exhibited can be deemed a sale by sample, nor will the mere exhibition of a specimen of the goods at the time of the sale amount to an affirmation that the bulk equals it in quality. The specimen may be exhibited simply to enable the buyer to form an opinion as to the probable quality of the goods, in order that he may decide whether he will go further with the negotiations; the seller may produce a sample but refuse to sell by it, requiring the purchaser to examine for himself; or the buyer may be unwilling to rely upon the sample and may require an express warranty. No one of these cases will constitute a sale by sample, for something more is necessary. The parties must treat the sample as a standard of the quality; they must deal with reference to it as such with the understanding that the bulk is to be like it,¹ and the buyer must rely upon it and not

v. Hueske (1867), 29 Tex. 355; Hughes v. Bray (1882), 60 Cal. 284; Hall v. Plassan (1867), 19 La. An. 11; Gunther v. Atwell (1862), 19 Md. 157; Day v. Raguet (1869), 14 Minn. 273; Graff v. Foster (1878), 67 Mo. 512; Boothby v. Plaisted (1871), 51 N. H. 436; Dayton v. Hoogland (1884), 39 Ohio St. 671; Proctor v. Spratley (1884), 78 Va. 254; Schuchardt v. Allens (1863), 1 Wall. (68 U. S.) 359; Barnard v. Kellogg (1870), 10 Wall. (77 U. S.) 383; Reynolds v. Palmer (1884), 21 Fed. R. 433.

In Pennsylvania the warranty is limited, and is merely that the bulk shall be of the same kind and be merchantable but not necessarily of the same quality. Selser v. Roberts, 105 Pa. St. 242; Boyd v. Wilson, 83 Pa. St. 319, 24 Am. R. 176; Fraley v. Bispham, 10 Pa. St. 320, 51 Am. Dec. 486.

¹ Thus in *Hargous v. Stone*, 5 N. Y. 73, it is said: "Every exhibition of a sample to the purchaser at the time of the sale does not *per se* make a sale by sample. There must be an agreement to sell by sample, or at least an understanding of the parties that the sale is to be by sample." And in *Gunther v. Atwell*, 19 Md. 157, the court say: "In order that the principle may be applied, it is necessary, in making the sale, that the sample should be so used between the buyer and seller as to express or become a part of the contract, or, in other words, that the sample should amount to and take the place of an express averment by the seller of the condition and quality of the goods upon which the buyer relies in making the purchase."

To like effect: *Day v. Raguet* (1869), 14 Minn. 203 (273); *Wood Harvester*

upon an express warranty or a personal examination of the goods¹

§ 1322. — **Effect of inspection.**—The sale by sample presupposes that the goods are not available to inspection, and are not in fact inspected by the purchaser. Hence if the seller insists that the buyer shall inspect the goods and rely upon his own judgment, and the buyer does inspect them as fully as he desires, there is no sale by sample although a specimen was

Co. v. Ramberg (1895), 60 Minn. 219, 61 N. W. R. 1132; Wood v. Michaud (1896), 63 Minn. 478, 65 N. W. R. 963.

The jury are not to *assume* that there was a sale by sample; it must be shown that the parties so dealt as to make it such. Proctor v. Spratley (1884), 78 Va. 254.

That a portion only of the bulk is examined does not constitute a sale by sample. Selser v. Roberts (1884), 105 Pa. St. 242.

In Ames v. Jones (1879), 77 N. Y. 614, it appeared that the seller had accumulated thirty thousand bushels of choice Napanee (Canada) barley, which was stored in elevator at Oswego, N. Y. An agent of the buyer visited Oswego, procured a sample of the barley and took it with him to New York, where he delivered it to his principal. The latter then telegraphed: "Will give you one-twenty for your thirty thousand choice Napanee, afloat in New York," and the seller telegraphed back: "Will accept your offer of one-twenty." Nothing was said about the sample, and it did not appear that the seller knew that a sample had been delivered to the buyer. *Held*, not a sale by sample.

¹ In Tye v. Fynmore, 3 Camp. 462, the seller exhibited a sample of "sassafras wood," and the buyer inspected it, having skill in such arti-

cles. The seller then warranted it to be "fair merchantable sassafras wood." *Held*, not a sale by sample with implied warranty, but a sale with express warranty. In Gardiner v. Gray, 4 Camp. 144, there was a sale of waste silk and a sample was shown, but it was found that "the sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity." In Powell v. Horton, 2 Bing. N. C. 668, there was a sample shown, but an express warranty was also given, and it was held not a sale by sample, but a sale with express warranty.

In Ames v. Jones, 77 N. Y. 614, a sample was shown, but it was not relied on as such; and it was held not a sale by sample.

In Wood v. Michaud (1896), 63 Minn. 478, 65 N. W. R. 963, there was a contract for the sale of corn to be grown and canned in 1893; a sample of the product for 1892 was shown, but the sale was by description. *Held*, not a sale by sample.

In Wood Harvester Co. v. Ramberg (1895), 60 Minn. 219, 61 N. W. R. 1132, a sample machine had been exhibited, but the purchase was made by order giving a certain warranty "and no other." *Held*, not a sale by sample.

exhibited.¹ So if the goods are present for examination and the buyer is at liberty to examine them as thoroughly as he pleases, the fact that he examines a part only will not make

¹The leading case on this point is *Barnard v. Kellogg* (1870), 10 Wall. (U. S.) 383, 19 L. ed. 987. It there appeared that Barnard, a commission merchant in Boston, had received from a correspondent in Buenos Ayres a lot of foreign wool. He put the wool in the hands of a Boston wool broker for sale with instructions not to sell unless the buyer came to Boston and examined the wool for himself. The broker sent samples to Kellogg, a wool merchant in Hartford. Kellogg made an offer for the wool if equal to sample. The offer was accepted provided Kellogg examined the wool on a certain day and reported whether he would take it. This condition was accepted and Kellogg went to Boston to examine the wool. The broker offered Kellogg an opportunity to examine all the bales and offered to have the bales opened for his inspection. After Kellogg had examined four bales as fully as he desired, he declined offers of further examination and bought all the wool. Some months afterwards, part of the bales when opened were found to have been deceitfully packed, though Barnard was ignorant of this and acted in good faith. Kellogg sued Barnard for damages, relying, 1, upon a sale by sample; 2, upon a promise, express or implied, that the bales should not be falsely packed; and 3, upon a promise, express or implied, that the wool inside of the bales should not differ from the samples by reason of false packing. The trial court found that an examination of the interior of bales was not customary; that though possible it was attended with great labor and delay, and that by the custom of merchants in Boston there is an implied warranty on the part of the seller that the bales are not falsely or deceitfully packed; and judgment was rendered for the purchaser. The United States supreme court reversed this judgment, holding that there was no sale by sample, and that a custom to charge the seller where the law did not charge him was not a valid custom. Upon the first point the court, per Davis, J., said: "That the wool was not sold by sample clearly appears. And it is equally clear that both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased. Barnard expressly stipulated, as a condition of sale, that Kellogg should examine the wool, and he did examine it for himself. If Kellogg intended to rely on the samples as a basis of purchase, why did he go to Boston and inspect the bales at all, after notice that such inspection was necessary before the sale could be completed? His conduct is wholly inconsistent with the theory of a sale by sample. If he wanted to secure himself against possible loss, he should either have required a warranty or taken the trouble of inspecting fully all the bales. Not doing this, he cannot turn round and charge the seller with the consequences of his own negligence. Barnard acted in good faith, and did not know or have any reason to believe that the wool was falsely packed. The sale on his part was intended to

that part a sample within the meaning of the rule,¹ unless the conduct of the seller is such as to reasonably lead the buyer to believe that the seller represents the part so examined to be a fair sample of the whole bulk and the parties deal accordingly;²

be upon the usual examination of the article, and the proceeding by Kellogg shows that he so understood it, and it is hard to see what ground of complaint even he has against Barnard. It will not do to say that it was inconvenient to examine all the bales, because if inconvenient it was still practicable, and that is all that the law requires."

In *Borthwick v. Young* (1885), 12 Ont. App. 671, plaintiff was negotiating for the purchase of apples then present in barrels. He asked the seller about them and was told they would be found to be a "good lot." Seller's agent opened several barrels for plaintiff to examine, and they "appeared to be good." Plaintiff might have examined them all, but did not, having previously bought satisfactory apples from the seller and relying upon his reputation as an honest packer. In fact there were a few good apples at the top of the barrels, but the bulk was not good. *Held*, not a sale by sample, and that there was no warranty, express or implied. *Caveat emptor* was the rule. Compare *Hanson v. Busse*, 45 Ill. 496, cited in a subsequent note.

¹*Salisbury v. Stainer* (1838), 19 Wend. (N. Y.) 159, 32 Am. Dec. 437, is a good illustration. It was a sale of hemp in bales. Before purchasing the buyer was sent to the place where the hemp was stored and directed to examine it for himself. He cut open one bale and might have opened all. The one examined was satisfactory and he bought all. When opened

some of the other bales were found to contain inferior goods. It was held that there was no sale by sample,—that there was no warranty implied that the unopened bales were like the opened ones or that the interior of the unopened bales should correspond with the exterior. *Beirne v. Dord* (1851), 5 N. Y. 95, 55 Am. Dec. 321, is to the same effect.

²*Hanson v. Busse* (1867), 45 Ill. 496, is a good illustration. It was a sale of one hundred and ten barrels of apples. In the language of the report, "the proof shows that the one hundred and ten barrels were piled up in tiers at a railway depot in Chicago. The purchaser went with the clerk of the plaintiffs [the sellers] to look at them. He opened a couple of barrels that stood on the floor. The purchaser was lame from rheumatism, and requested the clerk to climb up and open a barrel on the top of the tiers. He did so, and showed the purchaser some apples which were in good condition, and said they were all like that. The plaintiffs had told the defendant [the buyer] that the apples were just such as he had previously bought, shipped by the same man, and good hand-picked fruit. The apples in the three barrels exhibited as samples were unquestionably merchantable, or the defendant would not have bought. It would be unreasonable to require that he should have opened every one of the one hundred and ten barrels. He had the right to rely on the samples shown to him, and on the

or unless the place, position or condition of the goods is such that the bulk cannot be examined and that the part so examined must necessarily be treated as a sample.¹

§ 1323. — Where inspection of the goods is offered as the basis of the sale, the buyer cannot relieve himself and charge the seller merely on the ground that the examination will take time or is attended with labor and inconvenience: if it is practicable, no matter how inconvenient, the buyer, it is said, is not relieved,² unless the case falls within the exceptions last stated.

§ 1324. — There may also be a sale based partly on inspection and partly on a sample. Thus where the plaintiff

representations of the plaintiffs that the apples were good. He had no opportunity for the exercise of his own judgment, and the plaintiffs must have known that he bought relying upon their representations.”

Compare with *Borthwick v. Young* (1885), 12 Ont. App. 671, cited *supra*.

In *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321, it is said: “That a personal examination of the bulk of the goods by the purchaser at the time of the sale is not practicable or convenient furnishes no sufficient ground of itself to say that the sale is by sample. The want of an opportunity, from whatever cause, for such an examination is doubtless a strong fact in reference to the question of the character of the sale, whether it was or not made by sample. But it is nevertheless true that a contract of sale by sample may be made whether such examination be practicable or not, if the parties so agree. Where the acts and declarations of the parties in making the contract for the sale of goods are of doubtful construction, evidence that it was impracticable or inconvenient to examine the bulk of the goods would be proper, and,

in connection with evidence of other circumstances attending the transaction, might aid in coming to a correct conclusion in respect to the true character of the contract.”

¹In the sale of cotton in bales, it is said there is necessarily a sale by sample. As said by Savage, C. J., in *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158: “You cannot examine the article without opening the bales. That is never done; it would not be permitted, and would be attended with great expense and inconvenience. Hence, as I have heretofore said in the case of *Oneida Manufacturing Co. v. Lawrence*, 4 Cow. 440, every sale of packed cotton is a sale by sample. It is so by the usage of trade, which is founded upon general convenience and consent: that usage is shown in this case.” *Rose v. Beatie*, 2 Nott & McC. (S. C.) 538, is to the same effect.

²This is substantially the language of Davis, J., in *Barnard v. Kellogg*, 10 Wall. 383, *supra*. Equally strong is the language in *Hyatt v. Boyle*, 5 G. & J. (Md.) 110, 25 Am. Dec. 276, where it is said, of sales without examination generally, that the examination,

agreed to manufacture for the defendant a large number of iron bedsteads in accordance with a sample, but the contract also provided that the beds should be inspected and approved by the defendant at the plaintiff's factory, there was held to be a qualified warranty that the beds should be like the sample, and that the defendant's right to recover damages for a breach after acceptance of the beds was limited "to such defects, not existing in the sample, as were not apparent upon a reasonable inspection of the beds."¹

§ 1325. — How question determined.— Whether the sale was one made by sample or made upon the personal judgment of the buyer is ordinarily a question of fact,² which must be proved and not assumed,³ and which is to be determined in view of all the circumstances of the case.

§ 1326. — Effect of usage.— How far usage may affect the question is not, perhaps, entirely settled. It is clear, however, that local usages cannot defeat the express terms of the contract, nor can they contravene the settled principles of the law. If, therefore, the sale was made under such circumstances that the law does not impute a warranty, usage will be ineffectual to add one; if, under the circumstances, the law does raise a warranty, usage will not be permitted to defeat it.⁴

at the time of the sale, must be, "morally speaking, impracticable."

¹ *Leitch v. Gillette-Herzog Mfg. Co.* (1896), 64 Minn. 434, 67 N. W. R. 352.

² *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Proctor v. Spratley*, 78 Va. 254; *Jones v. Wasson*, 3 Baxt. (Tenn.) 211; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; *Brower v. Lewis*, 19 Barb. (N. Y.) 574.

³ *Proctor v. Spratley*, 78 Va. 254.

⁴ The question is discussed at much length in *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, 19 L. ed. 987. The sale was made upon personal examination, and it was clear that the

seller did not intend to warrant, but insisted that the buyer should satisfy himself. The court held that the sale was not by sample, and that evidence that in Boston and New York—the principal markets for such goods—a warranty was imposed by custom on the seller was not admissible. It appeared, however, that the parties did not know of the custom and could not have dealt in reference to it. The same was held as to a local usage in *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321, though the court said that "a general usage might have this effect, because the sale would have been

§ 1327. — **Parol evidence.**— Where the parties have reduced the terms of their contract to writing, which is silent as to the matter of sample, parol evidence is not admissible to show that the sale was made by sample;¹ though the rule is different, as has been already seen,² where the writing does not purport to be the contract, but is a mere informal memorandum, such as a bill of parcels.³ Neither, it is said, does the rule apply where the contract is so vague, general or incomplete as to require reference to the sample to identify the subject-matter.⁴

§ 1328. — **Extent of the warranty.**— The warranty arising in these cases is that the bulk of the goods is fairly equal to the sample in nature, kind and quality, and if the bulk does so correspond the warranty is satisfied. Where the goods consist of many parcels or packages of perhaps uneven quality, but the sample is represented as having been taken proportionately from each package and to fairly represent the average quality of the whole mass, the warranty will be satisfied if the bulk formed by commingling the contents of all the packages would be equal in quality to the average sample so

made in reference to it." In *Dickinson v. Gay*, 7 Allen (Mass.), 29, 83 Am. Dec. 656, the court held that there was no implied warranty on the part of a dealer against latent and unknown defects in sample and bulk alike, and that usage was not competent to add one.

In *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158, the court held that usage was admissible to determine the *character* of the sale, *e. g.*, that it was and must be regarded as a sale by sample; but this is clearly different from permitting usage to change the character of the sale as determined by the contract or the law.

¹ *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. R. 433, 40 Am. R. 775 (rely-

ing on *Meyer v. Everth*, 4 Camp. 22; *Gardiner v. Gray*, 4 Camp. 144; *Meres v. Ansell*, 3 Wil. 275), followed in *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. R. 830, 23 Am. St. R. 469, which cites also *Thompson v. Libby*, 34 Minn. 374.

² See *ante*, § 1255.

³ *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Atwater v. Clancy*, 107 Mass. 369; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *Stoops v. Smith*, 100 Mass. 63, 1 Am. R. 85; *Miller v. Stevens*, 100 Mass. 518, 1 Am. R. 139, 97 Am. Dec. 123; *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

⁴ See *Stoops v. Smith*, *supra*, and note in 97 Am. Dec. 76.

exhibited.¹ And it has been held that evidence is admissible of a custom to treat a sample of goods in several packages as being a sample of the average quality of the whole lot, and not of the average quality of each package.²

§ 1329. —. The warranty being that the bulk is equal to the sample, if it is so the warranty is not broken, in the ordinary case, so far as a dealer, not the manufacturer, is concerned by secret defects which affect the bulk and the sample alike and were unknown to both parties;³ nor will a custom to hold the seller liable in such cases be enforced.⁴ But where the seller is the manufacturer and the defect is one arising from the process of manufacture, then it is held that the sample must be considered free from any secret defect so arising from the process of manufacture though unknown to the seller as well as to the buyer.⁵

¹ Leonard v. Fowler, 44 N. Y. 289.

² Schnitzer v. Oriental Print Works, 114 Mass. 123.

³ Dickinson v. Gay, 7 Allen (Mass.), 29, 83 Am. Dec. 656; Bradford v. Manly, 13 Mass. 139, 7 Am. Dec. 122; Parkinson v. Lee, 2 East, 313; Sands v. Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374.

⁴ Dickinson v. Gay, *supra*.

⁵ Drummond v. Van Ingen (1887), 12 App. Cas. 284. Here cloth merchants ordered of cloth manufacturers a quantity of worsted coatings which were to be in quality and weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants, as the manufacturers knew, was to sell the cloth to clothiers or tailors. The cloth supplied corresponded in every particular with the samples, except that owing to a defect in manufacture they were unmerchantable for the purposes for which goods of that class

had previously been used in the trade.

The same defect existed in the samples, but was latent and not discoverable upon the usual and ordinary inspection. *Held*, that there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character would ordinarily be used. *Mody v. Gregson*, L. R. 4 Ex. 49, was approved. Lord Macnaghten, in his opinion, said: "As against the manufacturer I think it must be taken that the sample is free from all hidden defects of manufacture which would interfere with the proper use of the manufactured article. If the manufacturer supplies goods corresponding with the sample, but free from all such defects, he fulfills his bargain. If that is beyond his power, he must be responsible for undertaking more than he is able to perform." See also *Jones v. Padgett*, 21 Q. B. Div. 650.

Heilbutt v. Hickson, L. R. 7 C. P.

§ 1330. —. And it would seem that the same responsibility might attach to a dealer where he has undertaken to supply articles for a particular use, notwithstanding the exhibition of a sample apparently but not really fulfilling the undertaking.

§ 1331. — **Co-existence of other warranties.**— Although where goods are sold by sample, other warranties, such as that of merchantability or fitness, are not usually implied, it is not impossible that they should exist when such appears to have been the intention of the parties. Thus, where a manufacturer sold goods by sample for a special purpose, the fact that the sale was by sample, and that the bulk corresponded with the sample, was held not to exclude the implied warranty that the bulk and sample were free from defects in manufacture.

438, involved similar questions, though the chief points decided related to the matter of damages. A large quantity of army shoes had been sold, as per sample, and a sample shoe was deposited. A shipment was made, which, upon the usual inspection, was approved. Rumors were abroad that manufacturers were filling the soles of army shoes with paper. The buyers thereupon requested that a shoe of those furnished should be cut open for examination. The seller's agent consented that as many pairs be opened as the buyers desired, assuring them that no paper would be found. A shoe was cut open and found to be all right. The buyers thereupon accepted five thousand pairs, paid for them, and sent them forward to be supplied under contract to the French army. Here a pair was cut open, and found to contain paper. Others were examined and found to contain none. The sample shoe was then opened and contained paper. The facts being communicated to the seller, they wrote agreeing to take back all containing paper. Buyers thereupon took and paid for twelve thousand more pairs, which were also forwarded for acceptance by the French authorities. Here more shoes were cut open, and a very large proportion were found to contain paper, canvas shavings or roofing felt instead of leather, and the French authorities rejected the whole quantity. *Held*, that the letter of the defendants must be treated as a new and additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that were likely to arise with the French authorities at Lille, and upon the proper construction of the whole contract, including the letter, the plaintiffs were entitled to throw the shoes on the defendants' hands at Lille and at Fennings wharf, and recover the price of them.

which rendered them unfit for the purpose contemplated;¹ and the same result was reached where a latent defect in manufacture rendered both bulk and sample unmerchantable.² So, also, where the goods were sold by both sample and description, it was held that they must not only be equal to the sample but must also be of the kind described.³

c. Genuineness.

§ 1332. Implied warranty of genuineness on sale of bonds, notes, etc.—It has been seen in an earlier section that the seller of choses in action and other intangible personalty, like the seller of the tangible chattel, impliedly warrants his title to that which he so sells. He also, by the weight of authority, in the absence of anything showing a contrary intention, impliedly warrants that the bond, note, etc., which he sells is genuine, that is, that it is not a forgery but is a genuine instrument of the kind which it purports to be.⁴ He does not, however, warrant that it is valid in law, or that the maker is solvent, or that payment can be enforced.⁵

¹ Drummond v. Van Ingen, 12 App. Cas. 284, stated in the note to the preceding section. Thus on a sale, by sample, of canned lobster, there is an implied warranty that it is merchantable and fit for food. Leggett v. Young (1888), 29 New Bruns. 675.

² Mody v. Gregson, L. R. 4 Exch. 49, where a manufacturer sold cloth to correspond to sample and to be of a given weight. The goods were like the sample, but a foreign substance called china clay had been introduced to bring the cloth to the specified weight, and this substance rendered the cloth unmerchantable. It was held that there was also an implied warranty of merchantability.

³ Gould v. Stein, 149 Mass. 570, 22 N. E. R. 47, 5 L. R. A. 213, 14 Am. St. R. 455, and Nichol v. Godts, 10 Exch.

191 (stated *post* in note to § 1333); Miamisburg Twine Co. v. Wolhuter (1893), 71 Minn. 484, 74 N. W. R. 175.

⁴ Otis v. Cullom (1875), 92 U. S. 447; Ware v. McCormack (1894), 96 Ky. 139, 28 S. W. R. 157, 959; Porter v. Bright (1876), 83 Pa. St. 441; Pugh v. Moore (1892), 44 La. Ann. 209, 10 S. R. 710; Meyer v. Richards (1895), 163 U. S. 385; Smith v. McNair (1877), 19 Kan. 330, 27 Am. R. 117; Smith v. Corege (1890), 53 Ark. 295; Watson v. Cheshire (1865), 18 Iowa, 202, 87 Am. Dec. 382; Strauss v. Hensey (1895), 7 D. C. App. 289, 36 L. R. A. 92.

⁵ Ruohs v. Third Nat. Bank (1894), 94 Tenn. 57, 28 S. W. R. 303; Richardson v. Marshall County (1898), 100 Tenn. 346, 45 S. W. R. 440; Meyer v. Richards (1895), 163 U. S. 385.

d. Conformity to Description.

§ 1333. **Sale by description — The English rule.**— According to the prevailing rule in England, when the vendor sells goods by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver or has delivered should answer the description.¹ Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as warranty,² saying: "A good

¹ Under the Sale of Goods Act, see *Varley v. Whipp* (1900), 1 Q. B. 513.

² In *Chanter v. Hopkins*, 4 M. & W. 399, approved by Lord Blackburn in *Shand v. Bowes*, 2 App. Cas., at p. 480.

In *Nichol v. Godts* (1854), 10 Ex. 191, 23 L. J. Ex. 314, an agreement was made for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples." According to the evidence of the seller, the buyer was told that the oil was mixed to a certain extent with other oil, and for that reason it was sold only equal to the samples. The buyer accepted a portion and refused to take the residue, on the ground that it was not foreign refined rape oil, although it was equal to the samples and he knew at the time the contract was made that the oil was a mixture of rape and other oil. It was contended at the trial that the expression "warranted only equal to samples" excluded every other description of warranty; and, provided the oil was equal to the samples, that was sufficient to render the defendant liable to take it and pay for it, although, in point of fact, it did not answer the description of being foreign refined rape oil. But the court held that the terms "only equal to samples" were equivalent to "only equal to samples in

quality," and that besides this the oil must answer the description.

In *Shepherd v. Kain* (1821), 5 B. & Ald. 240, a ship was sold in accordance with an advertisement which described her as "a copper-fastened vessel," the proviso being added that the vessel was to be taken with all her faults, without any allowance for any defects whatsoever. It appeared that she was only partially copper-fastened, and the vendor was sued for breach of warranty. It was held that "with all faults" must mean with all faults which it may have consistently with its being the thing described. But here the ship was not a copper-fastened ship at all, and the verdict for the plaintiff was therefore sustained.

In *Taylor v. Bullen* (1850), 5 Ex. 779, a ship was sold by advertisement, described as "The fine Teak-built Barque Intrepid, A 1,286½ tons register, etc., well adapted for a passenger ship." But the statement was expressly made that "the vessel and her stores are to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." The court held that there was no warranty, and distinguished the case from *Shepherd v. Kain* (*supra*) on the ground that

deal of confusion has arisen in many of the cases upon this subject from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which a party under-

there *defects only* were provided against, while here allowance was to be made for *neither defects nor errors*. This was construed to include error of description, so far as it was clearly unintentional.

In *Allan v. Lake* (1852), 18 Q. B. 560, the defendant sold the plaintiff a quantity of turnip seed. In the sold note the seed was described as Skirving's Swede, though the invoice which accompanied it contained no such description. A few days later another parcel of seed was sold by the defendant to the plaintiff, the defendant stating that it was of the "same stock" as the former, and calling it Skirving's Swede. No bought or sold note was given on this occasion, and the invoice contained nothing of description beyond the word "turnips." The court held that the first parcel of seed was clearly sold under warranty as Skirving's Swede, and as to the second parcel there was evidence for the jury of the defendant's having warranted it also as the same.

In *Wieler v. Schilizzi* (1856), 17 C. B. 619, the defendant sold to the plaintiff certain parcels of Calcutta linseed. On the arrival of the seed the buyer objected to the quality, complaining that it contained a large admixture of rape and mustard seed, and therefore did not satisfy the contract, which called for Calcutta linseed. It appeared from the evidence that no seed comes to market without some mixture, usually about two or three per cent., but that the seed

in question contained about fifteen per cent. of tares, rape and mustard. The jury were told to consider whether the plaintiff got what he bargained for,—whether there was such an admixture of foreign substances as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract. The jury found for the plaintiff, and a new trial, on the ground of misdirection, was refused.

In *Bannerman v. White* (1861), 10 C. B. (N. S.) 844, the defendants agreed to buy a large quantity of hops from the plaintiff, who was a well-known hop-grower. The defendants first asked if any sulphur had been used in the treatment of the hops, saying that they would not even ask the price if sulphur had been used. The plaintiff said "No," and the agreement was then made. The hops were delivered and weighed, and subsequently it was discovered that sulphur had been used on five acres out of three hundred, but this fact was forgotten by the plaintiff, whose representation was without fraud. The question was put to the jury, "Was the affirmation that no sulphur had been used intended between the parties to be part of the contract of sale, and a warranty by the plaintiff?" The jury answered in the affirmative. It was therefore held to be the intention of the parties that the contract should be void if sulphur had been used.

In *Josling v. Kingsford* (1863), 13

takes shall be part of a contract, and, though part of the contract, collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the

C. B. (N. S.) 446, a contract was made for the sale of a quantity of "oxalic acid." The defendant, who sold the acid, was not the manufacturer. In making the contract he expressly disclaimed all responsibility as to the quality of the article, and at his suggestion the plaintiff, who negotiated the sale on commission, himself inspected it in order to form his own judgment as to its nature and properties. The buyer, having found that the acid contained a large amount of foreign substance, sued the plaintiff, and the plaintiff brought an action against the defendant on his contract, alleging non-delivery of "oxalic acid" according to agreement. The jury were told that the contract in question could be performed only by delivering that which in commercial language might be said to properly come under the denomination of oxalic acid. This direction was approved.

In *Azemar v. Casella* (1867), L. R. 2 C. P. 431, there was a contract for the sale by plaintiffs to defendants of "one hundred and twenty-eight bales of cotton, expected to arrive in London, per *Cheviot*, from Madras."

The cotton guaranteed equal to sealed sample in our [the brokers'] possession. Should the quality prove inferior to the guaranty, a fair allowance to be made." The sample was "long-staple Salem" cotton, while the bales sent contained "Western Madras," an inferior grade. Willes, J., says: "In determining the question, it is impossible to exclude from one's mind the fact that when a man bar-

gains for long-staple Salem cotton, and the seller offers him cotton of a totally different kind, and cotton which requires a different description of machinery for its manufacture, he is seeking to compel him to accept X when he bargained for Y. The allowance was to be in respect of inferiority of *quality*, and not of difference of kind: and the defendants were not bound to accept with an allowance cotton of a description different from that which they bargained for."

In *Hopkins v. Hitchcock* (1863), 14 C. B. (N. S.) 65, the defendant received an order from a correspondent at Bremen to purchase for him bar iron of a description known there as S. & H. crown iron. Upon inquiry he found that the firm of Snowden & Hopkins, whose mark that was, had ceased to exist, and had been succeeded by the firm of Hopkins & Co. (the plaintiffs); and he accordingly bought, through a broker, sixty-seven tons of iron from the plaintiffs, which was described in the bought and sold notes as "S. & H. (crown) common bars." The iron when tendered was found to bear the mark of the new firm "H. & Co.," with a crown, and was rejected by the defendant. The jury found that the mark "S. & H." was not material. Accordingly the court held that the contract was not for iron of a particular brand, but for iron of a known quality, and that the plaintiff tendered the article for which the defendant contracted.

breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill: as, if a man offers to buy peas of another and he sends him beans, he does not perform his contract, but that is not a warranty; there is no *warranty* that he should sell him peas,—the *contract* is to sell peas, and, if he sells anything else in their stead, it is a non-performance of it.”

§ 1334. Sale by description in the United States imports warranty of identity of kind.—While the distinction made by the English courts is clear enough and undoubtedly sound, so far at least as *executory* contracts are concerned,¹ the buyer not being obliged to accept a tender of goods of some other kind than that which was agreed upon, the prevailing rule in the United States regards an *executed* sale of goods by a particular name, title or description as importing a warranty² on

¹In *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. R. 438, it is said that, so long as the contract remains so far executory that repudiation or rescission is possible, the description may properly be treated as a condition; but that when repudiation or rescission are no longer possible, the buyer may then regard it as a warranty. Referring to this case, it is said in *Morse v. Union Stock Yards*, 21 Oreg. 289, 28 Pac. R. 2, 14 L. R. A. 157, that, “strictly speaking, the conditions do not become warranties, but, the sale having become consummated, the same facts which before constituted conditions precedent now constitute warranties.”

The distinction is of no consequence in those States (see *ante*, § 816) which permit rescission for mere breach of warranty.

²The old English case of *Chandelor v. Lopus*, 2 Cro. Jac. 2, *Smith's Lead Cases*, vol. I, 238, in which an assertion

by the seller that a jewel sold was a Bezoar stone was held not to amount to a warranty that it was such, has, upon this point, been overruled in England, and in this country has been quite generally disapproved; and the early New York cases (which were based upon *Chandelor v. Lopus*), *e. g.* *Seixas v. Woods*, 2 Caines, 48, 2 Am. Dec. 215, and *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266, have been disapproved in many of the other States, and have been practically overruled in New York, so far as the point now under consideration is concerned. See *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. R. 595; *White v. Miller*, 71 N. Y. 118, 37 Am. R. 13.

Chandelor v. Lopus has, however, been quite persistently adhered to in Pennsylvania and the warranty by description is limited to executory sales. See *Ryan v. Ulmer*, 108 Pa. St. 332, 56 Am. R. 210, 137 Pa. St. 310, 20

the part of the seller that the goods are in fact of the species, kind and quality which such name, title or description indicates¹ in all cases in which the goods were not open to obser-

Atl. R. 705; *Selser v. Roberts*, 105 Pa. St. 242; *Fogel v. Brubaker*, 122 id. 7.

¹ Thus in *Edgar v. Breck & Sons* (1899), 172 Mass. 581, 52 N. E. R. 1083, it is said that "when an executory contract is made for the sale of a described article, the correspondence between which and the description cannot be ascertained until after acceptance, words which before are words of description may be found to operate as a warranty after the goods are accepted and the sale is complete. It would work injustice to treat an essential term of the contract as performed or waived at a time when the purchaser still is unable to tell whether it has been performed or not. *White v. Miller*, 71 N. Y. 118, 129; *Shaw v. Smith*, 45 Kan. 334, 338. See *Henshaw v. Robins*, 9 Metc. 83."

A sale of seeds described in the catalogue and in the bill of parcels as "large Bristol cabbage seed" implies a warranty that the seed is of that variety. *White v. Miller*, 71 N. Y. 118, 27 Am. R. 13. Practically identical are *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. R. 438, 38 N. J. L. 496; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. R. 136.

A sale of bulbs as being of a certain variety imports a warranty that they shall prove to be of that variety. *Edgar v. Breck & Sons*, *supra*.

A customer inquired of a store-keeper if he had rape-seed for sale, and the latter replied that he had. The customer then said he would take twenty-five pounds, and the store-keeper weighed out that quantity of seed from a sack, which the

other took and paid for. It was not rape-seed but wild mustard seed, though both seller and buyer were ignorant of that fact. *Held*, a warranty would be implied that the seed was rape-seed. *Hoffman v. Dixon* (1900), 105 Wis. 315, 81 N. W. R. 491, 76 Am. St. R. 916.

A description of an article in a bill of parcels as "blue paint" amounts to a warranty that it shall be blue paint. *Borrekins v. Bevan*, 3 Rawle (Pa.), 23, 23 Am. Dec. 85. A description of goods as "strained resin" imports a warranty that it is such, and the fact that the buyer made some examination of the goods does not prevent his relying on the warranty where the defect could not have been fully discovered without tearing apart the barrels in which it was packed and in which the buyer designed to ship it to market. *Lewis v. Rountree*, 78 N. C. 323.

A description in an advertisement and in a bill of parcels of an article as "indigo" amounts to a warranty that it is indigo: *Henshaw v. Robins*, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; a description of the article as "blue vitriol" imports a warranty that it is such, and not green vitriol: *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. R. 595; a description of the article as "Paris green" amounts to a warranty that it is Paris green and not "chrome green," an article of similar appearance but less value: *Jones v. George*, 61 Tex. 345, 48 Am. R. 280, relying upon *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. R. 438, cited *supra*.

A description in a bill of parcels of

vation, or in which, though the goods were inspected, the want of identity was not apparent upon such inspection.¹

§ 1335. —: There is, moreover, authority for going further, and saying that not even actual knowledge of the defect will necessarily preclude a reliance upon the warranty; it being

goods sold as "winter-pressed sperm oil" amounts to a warranty that it is winter pressed and not summer pressed, which is inferior. *Osgood v. Lewis*, 2 H. & G. (Md.) 495, 18 Am. Dec. 317. *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420, is substantially identical.

A sale made by the descriptive words "No. 2, white mixed corn," imports a warranty both as to quality and variety. *Miller v. Moore*, 83 Ga. 684, 10 S. E. R. 360, 6 L. R. A. 374, 20 Am. St. R. 329.

A sale of a quantity of "pure Manila twine" imports a warranty that it shall be such. *Northwestern Cordage Co. v. Rice* (1896), 5 N. Dak. 432, 67 N. W. R. 298, 57 Am. St. R. 563.

A contract to deliver ice of a described quality and thickness imports a warranty that the ice shall be of that quality and thickness. *Morse v. Moore*, 83 Me. 473, 22 Atl. R. 362, 23 Am. St. R. 783, 13 L. R. A. 224.

On an order for two carloads of "beef cattle," which order the seller accepts, and then selects and ships without inspection by the buyer, there is an implied warranty that the cattle correspond to the description. *Morse v. Union Stock Yards*, 21 Oreg. 289, 28 Pac. R. 2, 14 L. R. A. 157. In *Foos v. Sabin*, 84 Ill. 564, the sale was of "fat cattle," and it was held that, though there was no implied warranty that the cattle would be of any particular weight, there

was an implied undertaking that they would be fit for sale in the market as "fat cattle."

See also *Hogins v. Plympton*, 11 Pick. (Mass.) 97; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. R. 100, 6 Am. St. R. 122.

Description must be basis of sale.

If the goods are really sold upon some other basis than description, then the mere fact that in a bill of parcels or otherwise they are subsequently described as of a certain kind will not change the sale to one by description with its attendant warranty. "This," said the court in *Carson v. Baillie*, 19 Pa. St. 375, 57 Am. Dec. 659, "would be equivalent to declaring the bill to be the only evidence of the contract, a proposition that was never thought of; and all the cases on implied warranty show that no such decision was ever intended. When a sale is by sample, then the sample, and not the name given in the bill of sale, is the standard by which the article is to be tested, because the purchase is made on the faith of the correspondence between the sample and the goods sold. Where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered."

¹ **How where defect was latent.**— But where the goods are sold by description, the fact that the buyer

a question for the jury to determine whether the purchaser relied upon the warranty or has waived his right to take advantage of it.¹ No formal method of description is essential. It may, as will appear from the cases cited in the margin, be made

inspected them will not deprive him of the benefit of the warranty where the defect was latent, as where the difference between genuine bulbs of the kind ordered, and different and inferior ones of the kind furnished, was not open to observation (*Edgar v. Breck & Sons* (1899), 172 Mass. 581, 52 N. E. R. 1083); or where corn in carload lots had been "false packed," having good corn on the surface but poor corn underneath. *Miller v. Moore*, 83 Ga. 684, 10 S. E. R. 360, 20 Am. St. R. 329, 6 L. R. A. 374, where *Meickley v. Parsons*, 66 Iowa, 63, 23 N. W. R. 265, 55 Am. R. 261; *Jones v. George*, 61 Tex. 345, 48 Am. R. 280, and *Gould v. Stein*, 149 Mass. 570. 22 N. E. R. 47, 14 Am. St. R. 455, 5 L. R. A. 213, were cited, and *Bleckley, C. J.*, said: "Whether *Hight v. Bacon*, 126 Mass. 10, 30 Am. R. 639 [stated in § 1314], and *Barnard v. Kellogg*, 10 Wall. (U. S.) 383 [stated in note to § 1322], are consistent with this rule we need not inquire, since we are quite certain that the rule prevails in Georgia, however it may be in some other States. *Atkins v. Cobb*, 56 Ga. 86."

¹In *Northwestern Cordage Co. v. Rice* (1896), 5 N. Dak. 432, 67 N. W. R. 298, 57 Am. St. R. 563, where there was a sale by description of "pure Manilla twine," the court, per *Corliss, J.*, said: "We think it would be an extremely unjust rule to interpret, as an implied waiver, the conduct of the purchaser in receiving the goods which do not exactly correspond to the warranty, merely be-

cause he might, by examination, have discovered the defect. It often happens that a purchaser is so situated that it is necessary for him to accept the article in its defective condition. It would indeed be singular that one who had placed him in this position should be allowed to escape liability on his contract of warranty. In many cases the inference of a purpose to rely upon the warranty is stronger than the inference of a purpose to pay the price of a good article for a defective one. In the case at bar, the jury would have been justified in finding that defendant could not, without particular examination, have discovered that the twine was not pure Manilla. In favor of one who has warranted an article, the purchaser does not owe the duty of careful inspection. He may rely on the warranty. There is much confusion in the authorities. This is the consequence of too much refinement in reasoning, and the making of many nice distinctions. The law on this subject should be adjusted to the needs of the business world, and be made as simple as possible. Without attempting to anticipate the exceptions to the general rule which in the future it may be found necessary to establish, we believe it to be in the interests of justice, and to fairly express the sense of business men upon the subject, that whatever form a warranty assumes, if there is in fact a warranty, the mere acceptance of the property will not, as a matter of law, bar a recovery for

by mere word of mouth, or by incorporation in circulars, advertisements, sales notes, invoices or bills of parcels.¹

§ 1336. — Description incorporating quality. — And though the name, title or description be based upon the quality of the goods, or be couched in such terms as might otherwise seem mere commendation of the goods, yet if, in the particular case, such name, title or description is known in the market as indicating goods of a distinct, though not necessarily of an absolutely uniform, grade or standard, it will import a warranty on the part of the seller that the goods are in fact of that grade or standard. In these cases the words denoting the grade or quality of the goods are not to be treated as mere words of

breach of the warranty, although an inspection of the property would have led to a discovery of the breach. Nor will actual knowledge of the defective condition of the thing delivered necessarily preclude a reliance upon the warranty. All the facts are to be laid before the jury, to the end that they may determine whether the purchaser relied on the warranty, and whether he has waived his right to take advantage of its breach. *Gould v. Stein*, 149 Mass. 570; *English v. Spokane Com. Co.*, 48 Fed. R. 196; *Lewis v. Rountree*, 78 N. C. 323; *Best v. Flint*, 58 Vt. 543, 56 Am. R. 570; *Polhemus v. Heiman*, 45 Cal. 573; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. R. 890; *Hege v. Newsome*, 96 Ind. 426; *Dayton v. Hooglund*, 39 Ohio St. 671; *Holloway v. Jacoby*, 120 Pa. St. 533, 6 Am. St. R. 737; *Parks v. Morris Tool Co.*, 54 N. Y. 586; *Zabriskie v. Central, etc. R. R. Co.*, 131 N. Y. 72; *Morse v. Moore*, 83 Me. 473, 23 Am. St. R. 783; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. R. 753." See also, especially, *Morse v. Moore*, *supra*; *Huyett & Smith Mfg.*

Co. v. Gray (1899), 124 N. C. 322, 32 S. E. R. 718.

¹ In *Winsor v. Lombard*, 18 Pick. (Mass.) 60, Chief Justice Shaw states the rule thus: "Without express warranty or actual fraud, every person who sells goods of a certain denomination or description undertakes, as a part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the kind, species and quality thus expressed in the contract of sale; the rule being that, upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described. This rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold."

Where goods of a given description have previously been sold, and the buyer orders more, there is an implied warranty that these shall be of the same kind as those formerly sold. *Bagley v. Rolling Mill*, 21 Fed. R. 159.

general commendation, but as words having a specific commercial signification.¹

§ 1337. — **Limits upon rule.**—This rule, however, cannot be extended beyond the limits indicated, nor convert general commendatory expressions, not having a commercial signification, into warranties of quality.² And, in any event, if the goods are of the *kind* described, no further warranty as to quality will be implied, as, for example, that the goods are suitable for the buyer's purposes.³

¹ Thus the words "prime quality" might in many cases be deemed to be mere seller's praise (see *ante*, § 1245), but where it appears that they have a fixed commercial meaning, they import a warranty, as in *Hastings v. Lovering*, 2 Pick. (Mass.) 214, 13 Am. Dec. 420, where a description as "prime quality winter oil" was held a warranty. So the word "choice" might often be merely matter of commendation or opinion (see *ante*, § 1241), but it may be so used in commercial transactions as to acquire a definite meaning, as in *Forcheimer v. Stewart*, 65 Iowa, 594, 54 Am. R. 30, where a description of goods as "choice, sugar cured, canvassed hams" was held to import a warranty of quality. So though the words "good," "high quality," etc., might often be mere words of praise, a representation that bicycles are to be of "good materials" and "of the highest possible grade" may be a warranty. *Burr v. Redhead*, 52 Neb. 617, 72 N. W. R. 1058. As to the use of the word "thoroughbred" in the sale of animals, see *Shambaugh v. Current* (1900), — Iowa, —, 82 N. W. R. 497.

The Pennsylvania case of *Ryan v. Ulmer*, 108 Pa. St. 332, 56 Am. R. 210, 137 Pa. St. 310, seems *contra*, but the Pennsylvania cases confessedly

stand on narrower ground than that adopted in most States.

² Many cases have been cited in an earlier section to the point that mere commendatory words which have not acquired a commercial significance do not import a warranty. See *ante*, § 1245, and notes. And "courts are usually disinclined, in doubtful cases, to construe words of description as amounting to a warranty." Whether they are so depends essentially upon the intention of the parties as shown by the circumstances. *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. R. 196.

³ Thus, in *Sweat v. Shumway*, 102 Mass. 365, 3 Am. R. 471, plaintiffs were manufacturers of chains which were known in the market as horn chains. They were in fact partly of horn and partly of hoof. Defendant bought of plaintiffs "all the horn chains they manufacture," and plaintiffs supplied such chains as they had been in the habit of manufacturing. *Held*, that there was no implied warranty that the chains were *all* horn, any more, for example, said the court, than a contract to supply gold watches or mahogany furniture would require every part of the watch to be gold or every part of the furniture to be mahogany.

So where a person buys, by descrip-

§ 1338. — **How determined.**—The practical test for determining whether the goods are of the kind described is, it is said, by ascertaining whether they are merchantable under the

tion, "Reed City lump coal," and that kind of coal is furnished, there is no additional implied warranty that it is suitable for the buyer's purpose. *Peoria Grape Sugar Co. v. Turney* (1898), 175 Ill. 631, 51 N. E. R. 587.

So where the contract called for "common hard brick," and these were furnished, there was held to be no implied warranty that they were fit for the buyer's purpose, though his general purpose was known to the seller. *Day v. Mapes-Reeves Construction Co.* (1899), 174 Mass. 412, 54 N. E. R. 873. To like effect: *Wisconsin Red Pressed Brick Co. v. Hood* (1895), 60 Minn. 401, 62 N. W. R. 550, 67 Minn. 329, 69 N. W. R. 1091; *Gregg v. Page Belting Co.* (1898), 69 N. H. 247, 46 Atl. R. 26; *Jarecki Mfg. Co. v. Kerr* (1895), 165 Pa. St. 529, 30 Atl. R. 1019, 44 Am. St. R. 674.

In *Diebold Safe Co. v. Huston* (1895), 55 Kan. 104, 39 Pac. R. 1035, 28 L. R. A. 53, where a "No. 4, fire-proof safe" of a certain make, style, finish and dimensions was ordered, it was held that if the safe furnished corresponded to the description and was what was known and meant as a "fire-proof" safe, no warranty that it was in fact indestructible by fire, or would protect its contents through any fire, would be implied. Conceding the general rule of warranty by description, the court said: "When, however, the question arises whether an article is of a particular quality or degree of excellence, unless it is designated by some term which is descriptive of the article and calls for a particular quality, the general rule is that no warranty of quality

will be implied," citing *Gossler v. Refinery*, *Winsor v. Lombard*, *post*, and other cases in preceding notes.

In *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, where there was a sale of "Manilla sugar," it was held that if the article was really of that kind according to the established standard, there was no further warranty implied as to its quality.

In *Winsor v. Lombard*, 18 Pick. (Mass.) 57, where there was a sale of "No. 1 Mackerel" and "No. 2 Mackerel," it was held that if they were properly such at the time they were branded, there was no further implied warranty that they were now in such condition that they might be so branded. So, in *Hyatt v. Boyle*, 5 G. & J. (Md.) 110, 25 Am. Dec. 276, it was held that on a sale of tobacco described as of a certain brand, there was no implied warranty further than that it was really of that brand. So, in *Rice v. Codman*, 1 Allen (Mass.), 377, where the goods were described as of a certain "invoice weight" and the description was correct, it was held that there was no implied warranty that this was their actual weight, and evidence that such was the understanding among dealers was rejected.

So where a quantity of "tallow" was sold, it was held that if the article supplied was tallow, there was no warranty to be implied that it should be of any particular quality or color. *Lamb v. Crafts*, 12 Metc. (Mass.) 353.

In *Kleeb v. Bard*, 7 Wash. 41, 34 Pac. R. 138, engines sold were described as of certain horse-power respectively, but this was held, under

denomination affixed to them by the seller,¹ though this, clearly, would not be the only method of determining the fact.

§ 1339. — Description coupled with other tests or limitations.— And further, though the description be coupled with a reference to some other test, as, for example, a reference to a sample, the description may still perform its appropriate function as the determinant of identity or kind, where such appears to have been the intention of the parties, leaving the sample, on the other hand, to a performance of its distinct function as the determinant of the quality.² And so though the description be coupled with words of limitation, as, for ex-

the circumstances, to be matter by which to distinguish the particular engines sold, and not a warranty that they were in fact of the horse-power mentioned.

¹ *Jennings v. Gratz*, 3 Rawle (Pa.), 168, 23 Am. Dec. 111.

² In *Gould v. Stein*, 149 Mass. 570, 22 N. E. R. 47, 14 Am. St. R. 455, 5 L. R. A. 213, a bought note described the goods as "148 bales Ceara scrap-rubber, as per sample, viz., 46 bales of first quality and 102 bales of second quality." The controversy related only to the one hundred and two bales. *Held*, that there was a warranty that the rubber was of second quality *as well* as a warranty that it was equal to the sample. So in *Nichol v. Godts*, 10 Ex. 191, where the goods were described as "foreign refined rape oil, warranted only equal to samples," it was held that a tender of oil not of the kind described was not enough, though it was equal to the sample.

But in *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. R. 536, the contract was as follows:

"We hereby agree to deliver to Messrs. H. J. De Witt & Son, at their factory in Brooklyn, N. Y., eighty

barrels of japan and twenty barrels of varnish within one year from date, these goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered.

"Turpentine copal varnish, at 65c. per gallon.

"Turpentine japan dryer, at 55c. per gallon.

"Each shipment to consist of eight barrels japan and two barrels varnish, to be made once a month."

In an action for the price, the buyers contended that there were here three standards of quality: 1, such as was to be furnished to the De Witt Cloth Co.; 2, as per sample; and 3, as described, to wit, turpentine copal varnish, and turpentine japan dryer. On the last point they contended that the sellers "engaged to deliver articles known to the trade by those names, and of a certain standard of quality;" but the court said: "We do not so construe the writing. All the terms descriptive of the quality are found in the sentence preceding. These sentences are nothing but stipulations in respect to the prices to be paid, and were not intended to fix quality."

ample, the sale of a described article "with all faults," the description may still be operative as determining the kind or identity of the article, leaving the expression "with all faults" limited to the faults which an article of the kind described may have.¹

e. Merchantability.

§ 1340. Warranty of merchantability arises on executory sale of merchandise.—Akin to the questions discussed in the preceding subdivision is that which arises upon an executory sale of merchandise, as where goods of some specific kind are ordered of the manufacturer or dealer which the buyer has neither inspected nor selected. The rule of *caveat emptor* cannot apply here because all of the essential conditions of the rule — as, for example, present executed sale, a specific and ascertained chattel, and opportunity for inspection — are wanting. The buyer necessarily confides in the skill, judgment or knowledge of the seller, and the rule is well settled that, upon the executory sale of goods which the buyer has not inspected, there is, in addition to the implied warranty that they are of the *kind* ordered, a further implied warranty that they are *merchantable*, by which is meant that they are of fair average quality or goodness according to their kind, free from remarkable defects, and as such salable in the market at the average or ordinary price.²

¹Thus in *Whitney v. Boardman*, 118 Mass. 242, there was a sale of Cawnpore buffalo hides, with all faults, and it was held that this meant only such faults as Cawnpore buffalo hides might have; and in *Shepherd v. Kain*, 5 B. & Ald. 240, where the sale was of a copper-fastened vessel "with all faults, without allowance for any defects whatsoever," it was held that the vessel must still be copper fastened. The court illustrated the rule by saying, "Suppose a silver service is sold 'with all faults,' and it turns out to be plated."

²In *Howard v. Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572. Cowen, J., states the rule thus: "Where the contract is executory, or, in other words, to deliver an article not defined at the time, on a future day, whether the vendor have an article of the kind on hand, or if it is afterwards to be procured or manufactured, the promisee cannot be compelled to put up satisfied with an inferior commodity. The contract always carries an obligation that it shall be at least merchantable — at least of medium quality or goodness. If it comes short of this, it may be

§ 1341. — What satisfies.— This rule clearly does not require the best goods in the market, nor, necessarily, the second best; but it is equally clear that it will not be satisfied by a delivery of the worst. A more precise statement is not possible.

returned, after the vendee has had a reasonable time to inspect it." To same effect is the rule in *Hargous v. Stone*, 5 N. Y. 73; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305.

In *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560, it appeared that Babcock had ordered of Trice a quantity of corn. "Under this contract," said the court, "the law will imply that the parties contemplated that the corn should be of a fair and merchantable quality, and will raise a warranty to that effect. The contract was executory, the corn was not purchased upon inspection, and the duty of Trice was to deliver a fair article fit for use and market as a sound commodity; and his duty, under the contract, was not performed until he had done so."

In *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290, the court say that though, in the absence of express stipulation, the buyer "cannot insist that the article shall be of any special degree of fineness, yet he has a right to insist that it shall be of medium quality or goodness, free from such defects as would render it unmerchantable or unfit for the purpose for which it is ordinarily used."

In a late case in Massachusetts (*Murchie v. Cornell* (1891), 155 Mass. 60, 29 N. E. R. 207, 14 L. R. A. 492, 31 Am. St. R. 526), where there had been an order given for a cargo of ice, it is said that "in many cases like the present the inference is warranted that the thing to be furnished must be not only a thing of the name

mentioned in the contract, but something more. How much more may depend upon circumstances, and at times the whole question may be for the jury. If a very vague, generic word is used, like 'ice,' which taken literally may be satisfied by a worthless article, and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name. If that is not furnished, the contract is not performed." So in *Warner v. Arctic Ice Co.*, 74 Me. 475, it was held that on an executory contract for the sale of ice, the buyer was not, without an express warranty, entitled to ice of the first quality, but he was entitled to ice of a "fair, merchantable quality." And in *Cullen v. Bimm*, 37 Ohio St. 236, where there was a sale of an ice-house full of ice, the court said that the warranty of merchantability must receive a reasonable construction, and did not require that *all* the ice be good. The court illustrated by saying that if the contract was to deliver six sound apples, it would not be complied with if one of the apples was defective; but if the contract were for a barrel of sound apples, it could not be rejected because one unsound one was found in the barrel.

In *Holloway v. Jacoby*, 120 Pa. St. 583, 15 Atl. R. 487, 6 Am. St. R. 737, there was an order for a carload of corn. "We are of opinion," said the

Each case must be governed by its own facts and circumstances, and in the light of these it must be determined whether the goods supplied are of at least medium quality and goodness. More than that is not required: less than that will not suffice.

§ 1342. — How when there is express warranty of quality.—As has been seen in an earlier section, this implied warranty of merchantability will not ordinarily arise where an express warranty of quality has been given and accepted;¹ but this is not an inflexible rule, and the warranty of merchantability may co-exist with other warranties, such as that of identity of kind or conformity to sample, where such appears to have been the intention of the parties.²

court, "that there was an implied warranty that the corn was good, salable corn."

To like effect: *English v. Spokane Com. Co.*, 15 U. S. App. 218, 6 C. C. A. 416, 57 Fed. R. 451; *Fogle v. Brubaker*, 122 Pa. St. 7, 15 Atl. R. 692; *Hood v. Bloch*, 29 W. Va. 245, 11 S. E. R. 910; *Wilcox v. Hall*, 53 Ga. 635; *Fitch v. Archibald*, 29 N. J. L. 160; *Ketchum v. Wells*, 19 Wis. 25; *Morehouse v. Comstock*, 42 Wis. 626; *Merriam v. Field*, 39 Wis. 578; *McClung v. Kelley*, 21 Iowa, 508; *Davis v. Sweeney*, 75 Iowa, 45, 39 N. W. R. 174; *Forcheimer v. Stewart*, 65 Iowa, 593, 54 Am. R. 30, 22 N. W. R. 886; *Best v. Flint*, 58 Vt. 543, 56 Am. R. 570; *Doane v. Dunham*, 65 Ill. 512; *Misner v. Granger*, 9 Ill. 69; *Fish v. Roseberry*, 22 Ill. 288; *Brantley v. Thomas*, 22 Tex. 271, 73 Am. Dec. 264; *Alden v. Hart* (1894), 161 Mass. 576, 37 N. E. R. 742; *Sweat v. Shumway*, 102 Mass. 365, 3 Am. R. 471; *Whitmore v. Iron Co.*, 2 Allen (Mass.), 52, 58.

Such a warranty is declared by the code in California (*Blackwood v.*

Packing Co., 76 Cal. 212, 18 Pac. R. 248, 9 Am. St. R. 199) and Georgia. *Wilcox v. Owens*, 64 Ga. 601.

The English cases are to the same effect: *Jones v. Just*, L. R. 3 Q. B. 197, 37 L. J. Q. B. 89; *Drummond v. Van Ingen*, 12 App. Cas. 284, 290; *Mody v. Gregson*, L. R. 4 Ex. 49; *Bigge v. Parkinson*, 7 H. & N. 955.

¹ See *ante*, § 1259.

² See *ante*, § 1260 and § 1261.

Thus, as has been seen, in *Mody v. Gregson*, L. R. 4 Ex. 49, the fact that the sale was by sample was held not to exclude the implied warranty on the part of the manufacturers and sellers of the goods that they were merchantable. See also *Drummond v. Van Ingen*, 12 App. Cas. 284, *ante*, § 1329, note; and *Jones v. Padgett*, 24 Q. B. Div. 650, *ante*, § 1329, note.

In *Bigge v. Parkinson*, 7 Hurl. & Norm. 955, an express warranty that the goods should pass the inspection of the East India Company was held not to exclude the implied warranty that they were merchantable.

f. Fitness for Intended Use.

§ 1343. Implied warranty of fitness where goods ordered for particular use.—A further question arising in these cases of executory sales is that of the existence of an implied warranty of fitness for a contemplated use, as where a manufacturer or dealer is called upon or proposes to furnish an article which shall be suitable for some particular purpose which the buyer has in view and which he discloses to the seller.

§ 1344. —. The rule of *caveat emptor* cannot apply here for the same reasons which give rise to the implied warranty of merchantability. No specific chattel is had in view. The buyer discloses to the seller his need, and trusts to the judgment, skill or experience of the seller to supply an article which shall be suitable for the buyer's purposes, and which the seller, by accepting the order, impliedly agrees to produce. The rule here, therefore, is that, where the buyer, disclosing the purpose to be accomplished,¹ orders an article to supply

¹ Knowledge on the part of the seller of the particular use is by the terms of the rule an indispensable requisite — *sine qua non*. The case of *Jones v. Padgett* (1890), 24 Q. B. Div. 650, affords an excellent illustration. There a woolen merchant, who was also a tailor, ordered cloth of a certain kind of a manufacturer. The tailor designed to use the cloth for a specific purpose, but he did not disclose it to the seller, nor did the latter know that the buyer was also a tailor. The cloth furnished was of the kind agreed upon, it was in accordance with samples, and was fit for at least many of the uses to which such cloth was ordinarily put, but it proved to be unfit for the buyer's particular purpose, which was to make it up into servants' liveries. *Held*, that there was no implied warranty that it was fit for the buyer's

purpose. Said Lord Coleridge, C. J.: "There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose, he impliedly warrants that it is fit for that particular purpose. That is a principle which was established some sixty years ago in the case of *Jones v. Bright*, 5 Bing. 533, and has been acted upon ever since. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought, and there was nothing to fix him with knowledge of that purpose. Here all that was shown was that the seller on the one side was a manufacturer, and the buyer on the other side was a woolen merchant. No doubt it was possible that the buyer might sell the goods to some person or other who might use them for a purpose for

that purpose from a manufacturer or dealer in such articles, trusting to the latter's skill, judgment or experience to determine what the article shall be, the seller, by accepting the order, impliedly agrees that the article which he supplies shall in fact be reasonably fit and appropriate to the purpose so disclosed.¹

which they were not fit, and I may assume that the goods here were unfit for the particular purpose to which the plaintiff applied them. But there was nothing, beyond the position of the parties, to show that the seller knew the specific purpose for which they were bought, and it could not be denied that they might have been used for a variety of other purposes for which they were fitted. The plaintiff might have sold them to be used for purposes for which they were applicable. But then it is said that the case of *Drummond v. Van Ingen*, 12 App. Cas. 284, in the House of Lords carries the law farther than *Jones v. Bright*. In my opinion that is not so. There was no intention on the part of the lords to extend the old rule. Lord Macnaghten expressly said that he did not go beyond it; so also did Lord Selborne. And Lord Herschell, on whose judgment special reliance has been placed, was particularly careful to explain that he did not intend to carry the doctrine farther."

See also *Hight v. Bacon* (1878), 126 Mass. 10; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. R. 655, 27 L. R. A. 96; *Morris v. Bradley Fertilizer Co.* (1894), 64 Fed. R. 55, 12 C. C. A. 34, 28 U. S. App. 87.

How and when knowledge communicated.—No particular method of communicating the proposed use is necessary. The fact of its communication, and the seller's under-

taking to supply an article fit, are the material things. It may be communicated by acts and conduct as well as by words. *Gillespie v. Cheney* (1896), 2 Q. B. 59. The purpose may also have been communicated in the negotiations preliminary to the sale, and that it was so communicated may be shown, although the formal contract is silent as to the purpose. As said in *Gillespie v. Cheney*, *supra*: "The course of dealing and conduct may be important to show that in the course of the antecedent negotiations the particular purpose for which the goods were required was stated to the seller, or to show that the buyer relied on the seller's skill and judgment. Those are not things one would expect to find in the contract itself; they are matters to be gathered from the course pursued by the parties, and from their conduct and acts and writings antecedent but leading up to the contract itself."

¹ This accords with the fourth rule as laid down by Mellor, J., in the leading case of *Jones v. Just*, L. R. 3 Q. B. 197, as follows: "*Fourthly*.—Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is

§ 1345. — **To what sellers rule applies.**—This rule is most naturally and appropriately applicable to the case of a manufacturer rather than a dealer, and it has sometimes been said to be confined to undertakings by a manufacturer only.

to be applied. In such case the buyer trusts to the manufacturer or dealer and relies upon his judgment, and not upon his own." Accord: *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Drummond v. Van Ingen*, 12 App. Cas. 284; *Randall v. Newson*, 2 Q. B. Div. 102; *Jones v. Padgett*, 24 Q. B. Div. 650.

The American cases are full to the same effect: *Kellogg Bridge Co. v. Hamilton* (1884), 110 U. S. 108, 28 L. ed. 86; *Nashua Iron Co. v. Brush* (1898), 50 U. S. App. 461, 33 C. C. A. 456, 91 Fed. R. 213; *Pease v. Sabin* (1866), 38 Vt. 432, 91 Am. Dec. 364; *Beals v. Olmstead* (1852), 24 Vt. 114, 58 Am. Dec. 150; *Getty v. Rountree* (1850), 2 Pin. (Wis.) 379, 54 Am. Dec. 138; *Brenton v. Davis*, 8 Blackf. (Ind., 1847) 317, 44 Am. Dec. 769; *Rodgers v. Niles* (1860), 11 Ohio St. 48, 78 Am. Dec. 290; *Woodle v. Whitney* (1868), 23 Wis. 55, 99 Am. Dec. 102; *Snow v. Schomacker Mfg. Co.* (1881), 69 Ala. 111, 44 Am. R. 509; *Poland v. Miller* (1883), 95 Ind. 387, 48 Am. R. 730; *Best v. Flint* (1885), 58 Vt. 543, 56 Am. R. 570; *Sinclair v. Hathaway* (1885), 57 Mich. 60, 23 N. W. R. 459, 58 Am. R. 327; *Gerst v. Jones* (1879), 32 Gratt. (Va.) 518, 34 Am. R. 773; *Morse v. Union Stock Yards* (1891), 21 Oreg. 289, 28 Pac. R. 2, 14 L. R. A. 157; *Edwards v. Dillon* (1893), 147 Ill. 14, 35 N. E. R. 135, 37 Am. St. R. 199; *Breen v. Moran* (1892), 51 Minn. 525, 53 N. W. R. 755; *Omaha Coal Co. v. Fay* (1893), 37 Neb. 68, 55 N. W. R. 211; *Baumbach Co. v. Gessler* (1891), 79 Wis. 567, 48 N. W. R. 802; *Merrill v.*

Nightingale (1875), 39 Wis. 247; *Blackmore v. Fairbanks* (1890), 79 Iowa, 282, 44 N. W. R. 548; *Davis v. Sweeney* (1888), 75 Iowa, 45, 39 N. W. R. 174; *Smith v. Hightower* (1886), 76 Ga. 629; *Wilcox v. Hall* (1875), 53 Ga. 635; *Gammell v. Gunby* (1874), 52 Ga. 504; *Robson v. Miller* (1879), 12 S. C. 586; *Thomas v. Simpson* (1879), 80 N. C. 4; *Byers v. Chapin* (1876), 28 Ohio St. 300; *Lee v. Sickles Saddlery Co.* (1889), 38 Mo. App. 201; *Armstrong v. Johnson Tobacco Co.* (1890), 41 Mo. App. 254; *Downing v. Dearborn* (1885), 77 Me. 457, 1 Atl. R. 407; *Craver v. Hornburg* (1881), 26 Kan. 94; *Weed v. Dyer* (1890), 53 Ark. 155, 13 S. W. R. 592; *Curtis Mfg. Co. v. Williams* (1886), 48 Ark. 325, 3 S. W. R. 517; *Overton v. Phelan* (1859), 2 Head (39 Tenn.), 445; *Fox v. Harvester, etc. Works* (1890), 83 Cal. 333, 23 Pac. R. 295; *Ottawa Bottle & Flint Glass Co. v. Gunther* (1887), 31 Fed. R. 208; *Union Hide & Leather Co. v. Reissig* (1868), 48 Ill. 75; *Beers v. Williams* (1854), 16 Ill. 69; *Tacoma Coal Co. v. Bradley* (1891), 2 Wash. 600, 27 Pac. R. 454; *Pacific Iron Works v. Newhall* (1867), 34 Conn. 67; *Port Carbon Iron Co. v. Groves* (1871), 68 Pa. St. 149; *Wood Mower & Reaper Co. v. Thayer* (1888), 50 Hun (N. Y.), 516; *Kennebrew v. Southern Automatic, etc. Co.* (1894), 106 Ala. 377, 17 S. R. 545; *Coyle v. Baum*, 3 Okla. 695, 41 Pac. R. 389.

In the case of articles designed for use, the warranty would include an assurance that the article could be used in the ordinary manner, as, for example, that lime sold for use in

There can be no question, however, that it extends to the dealer also, provided the conditions stated in the rule are present, namely, an executory agreement by the dealer to supply an article not yet ascertained, but left to be determined by him according to his own judgment in view of the purpose to be subserved by it as communicated to him by the buyer.¹

§ 1346. — Extent of the warranty — Latent defects.—
The obligation of the seller, at least where he is also the man-

making mortar could be used by mixing with the usual quantity of water. *Omaha Coal Co. v. Fay* (1893), 37 Neb. 68, 55 N. W. R. 211.

Where there is a sale of oats to a liveryman to be used in feeding his livery horses, with knowledge of such purpose in the seller and no inspection by buyer, there is an implied warranty that the oats are fit for the purpose. *Coyle v. Baum* (1895), 3 Okla. 695, 41 Pac. R. 389.

In *Kellogg Bridge Co. v. Hamilton* (1884), 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. R. 537, it appeared that the bridge company had a contract for the construction of a railroad bridge and had partially completed it. The company then made a contract with Hamilton to complete the structure, purchasing of the company the work and material already supplied by it. Among this was certain "false work" which the bridge company had already put in position. This false work subsequently proved to have been defectively constructed (though this could not be discovered when the contract was made), and Hamilton sustained loss by reason of its giving way. *Held*, that there was an implied warranty on the part of the bridge company that the false work was reasonably fit for its pur-

pose, and that Hamilton might recover.

So a barrel-maker who undertakes to supply barrels to hold whiskey impliedly warrants their fitness, and is liable for loss by leakage caused by defective materials and workmanship (*Poland v. Miller*, 95 Ind. 387, 48 Am. R. 730); and a box-manufacturer who undertakes to supply boxes for the packing of tobacco, being left at liberty to select his own materials, impliedly warrants their fitness, and is liable for a loss of tobacco from moulding caused by the use of unseasoned wood. *Gerst v. Jones*, 32 Gratt. (Va.) 518, 34 Am. R. 773.

¹*Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. R. 696, 30 L. ed. 810; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. R. 886, 11 L. R. A. 681; *Jones v. Just*, L. R. 3 Q. B. 197; *Morse v. Union Stock Yards*, 21 Oreg. 289, 28 Pac. R. 2, 14 L. R. A. 157 [citing *Jones v. Just*, *supra*; *Lewis v. Rountree*, 78 N. C. 323; *Hanks v. McKee*, 2 Litt. (Ky.) 227, 13 Am. Dec. 265; *Ketchum v. Wells*, 19 Wis. 34; *Whitaker v. McCormick*, 6 Mo. App. 114; *Flint v. Lyon*, 4 Cal. 17; *Chicago Packing & P. Co. v. Tilton*, 87 Ill. 547; *Messenger v. Pratt*, 3 Lans. (N. Y.) 234]; *McCaa v. Elam Drug Co.* (1896), 114 Ala. 74, 21 S. R. 479, 62 Am. St. R. 88.

ufacturer, seems to be absolute, and will attach notwithstanding the article supplied failed of its purpose only because of some latent defect of which the seller was ignorant.¹ He certainly is liable for latent defects of which he has knowledge,

¹This was so held in *Randall v. Newson* (1877), 2 Q. B. Div. 102, C. A. Here defendant, a carriage builder, had sold to plaintiff a carriage fitted with thills. Plaintiff afterwards ordered a pole to be made and fitted to it. Defendant made the pole, which broke when used, because, as the jury found, the material was not suitable, though they also found that defendant had been guilty of no negligence. The breaking of the pole caused injury to plaintiff's horses and he brought suit. There was a verdict for the plaintiff. On motion for judgment for defendant, the court of queen's bench ordered judgment for him on the ground that the finding of the jury amounted to a finding of a latent defect which no care or skill could discover, and therefore the case was governed by *Readhead v. Railway Co.*, L. R. 4 Q. B. 379. Plaintiff appealed to the court of appeal, where the judgment was reversed. Brett, J., who delivered the opinion, said: "The question is, what, in such a contract, is the implied undertaking of the seller as to the efficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?" He then proceeds to an exhaustive discussion of the authorities, distinguishing *Readhead v. Railway Co.*, *supra*, and *Francis v. Cockrell*, L. R. 5 Q. B. 501, which followed it; and concludes that the undertaking is

absolute, that the article must in fact be reasonably suitable and thus conform to the undertaking, and that if it does not so conform "it does not do so more or less because the defect in it is patent or latent or discoverable."

Rodgers v. Niles (1860), 11 Ohio St. 48, 78 Am. Dec. 290, is to same effect, though two of the judges dissented, relying on *Hoe v. Sanborn*, *post*.

In *Briggs v. Hunton* (1895), 87 Me. 145, 32 Atl. R. 794, 47 Am. St. R. 318, it was held that the owner of a stallion, affected with a disease of which the owner was ignorant, and who sells the services of the stallion for breeding purposes, is not liable upon any implied warranty against such secret defect.

Hoe v. Sanborn (1860), 21 N. Y. 552, 78 Am. Dec. 163, is opposed to *Randall v. Newson*, *supra*. In an elaborate opinion, Selden, J., holds that while the manufacturer is liable for latent defects growing out of the process of manufacture, he is not liable for latent defects in materials used "which he is not shown and cannot be presumed to have known." (See also other New York cases cited in following note.)

Bragg v. Morrill (1876), 49 Vt. 45, 24 Am. R. 102, is also opposed to some degree. Here defendant furnished a shaft for use in plaintiff's factory. Defendant bought the shaft of another manufacturer, turned it to fit plaintiff's pulleys, and supplied it to plaintiff at an agreed price per pound for the shaft, and an agreed price

and, if he is the manufacturer, he is liable for defects which grow out of the process of manufacture, for these he is presumed to know.¹

§ 1347. — Reasonable fitness.—The warranty, unless more is stipulated for or clearly contemplated, does not demand the best possible article to supply the purpose, or that it shall be

per day for the time consumed in turning it. It proved to be defective by reason of latent defects in the material, produced by the unskilfulness of the original maker, and for which defendant was not responsible and of which he had no knowledge. Said the court: "We think the result of the cases on implied warranty is, that the vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him, and which have been produced through the unskilfulness of some previous manufacturer or owner, without his knowledge or fault, except in those cases where the sale of the article by him is, in and of itself, legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects, as is the case in the sale of provisions for domestic use. On this ground the defendant is not liable on an implied warranty of the shaft for the latent defects that caused it to break, and were wholly unknown to him, and were not produced through any fault or unskilfulness on his part, but wholly through the fault or unskilfulness of the manufacturer of the shaft from the raw material."

Quoted with approval and applied in *McKinnon Mfg. Co. v. Alpena Fish Co.* (1894), 102 Mich. 221, 60 N. W. R. 472.

Under the California code, see *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. R. 440.

Under the Georgia code, see *Snowden v. Waterman* (1898), 105 Ga. 384, 31 S. E. R. 110.

¹ **Manufacturer liable for secret defects growing out of process of manufacture.**—*Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Leopold v. Van Kirk*, 27 Wis. 152; *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. R. 440; *Carleton v. Lombard* (1896), 149 N. Y. 137, 43 N. E. R. 422; *Bierman v. City Mills Co.* (1897), 151 N. Y. 482, 45 N. E. R. 856, 37 L. R. A. 799, 56 Am. St. R. 635; *Kellogg Bridge Co. v. Hamilton* (1884), 110 U. S. 108, 28 L. ed. 86; *Nashua Iron Co. v. Brush* (1898), 50 U. S. App. 461, 33 C. C. A. 456, 91 Fed. R. 213.

Drummond v. Van Ingen, 12 App. Cas. 384; *Mody v. Gregson*, L. R. 4 Exch. 49; and *Heilbutt v. Hickson*, L. R. 7 C. P. 438, stated *ante* in the notes to section 1329, are also excellent illustrations.

If some defects are unavoidable in manufacture, the seller who manufactures the goods impliedly warrants that the defects in these goods are not greater or more numerous than usual. *Tennessee River Compress Co. v. Leeds* (1896), 97 Tenn. 574, 37 S. W. R. 389.

Dealer, not manufacturer, not liable for secret defects of which he is ignorant.—*White v. Oakes* (1896), 88 Me. 367, 34 Atl. R. 175, 32 L. R. A. 592; though he would be liable if he knew of them. *Id.*

perfect of its kind or perfectly adapted to its use; if it is of the kind usually manufactured and used and reasonably fit for the purpose, this is all that the law requires.¹ And if the article is reasonably fit, there is no further warranty implied that it will in practice produce any particular result, as, for example, in the case of machinery sold, that it will manufacture goods of any particular grade or quality,² or of any particular amount,³ unless the grade, quality or amount enters into the purpose specified.

§ 1348. — Article originally designed for different purpose—Second-hand goods.—And though the buyer's purpose be known to the seller, still if the article supplied is, to the knowledge of both parties, one designed for an entirely different purpose, and its fitness for the buyer's use is therefore more or less conjectural, it is said that the circumstances ought to be very cogent to raise a warranty of fitness.⁴ It is said also that the warranty will not attach where the article, *e. g.*, machinery, is expressly sold as a second-hand article.⁵

§ 1349. — Warranty not implied where buyer selects the article or a special and ascertained article is ordered.—The implied warranty of fitness is not to be extended to cases

¹ Harris v. Waite, 51 Vt. 481, 31 Am. R. 694; Tennessee River Compress Co. v. Leeds (1896), 97 Tenn. 574, 37 S. W. R. 389.

² Conant v. National State Bank, 121 Ind. 323, 22 N. E. R. 250 [citing Robinson Mach. Works v. Chandler, 56 Ind. 575; Chanter v. Hopkins, 4 M. & W. 399; Ollivant v. Bayley, 5 Q. B. 288; Port Carbon Co. v. Groves, 68 Pa. St. 149].

³ Rice v. Forsyth, 41 Md. 389. Certainly if the amount to be done is not disclosed to the seller, and the buyer's complaint is that it will not do as much as he expected. *Id.*

⁴ McGraw v. Fletcher, 35 Mich. 104, where it is said: "Whether a war-

ranty of utility in the working of a machine in some special service not strictly within the sphere of action for which it was contrived can be implied must depend upon the particular facts, and it seems reasonable to conclude that they ought to be very strong to warrant the inference of an agreement by the seller that a machine contrived for work of a given kind and within a given range will operate well in practice in work of a different character or in work required to be carried on under conditions not agreeable to its plan or in harmony with its arrangements for being worked and kept in action."

⁵ Ramming v. Caldwell (1891), 43

which lack the necessary conditions upon which it depends. The essence of the rule is, that the contract is executory; that the particular article is not designated by the buyer; that only his need is known; that he does not undertake or is not able to determine what will best supply his need, and therefore necessarily leaves the seller to make the determination and take the risk; and if these elements are wanting, the rule does not apply.

If, therefore, a known, described and defined article is agreed upon, and that known, described or defined article is furnished, there is no implied warranty of fitness even though the seller is the manufacturer and the buyer disclosed to him the purpose for which the article was purchased.¹

Ill. App. 175. See also *Rice v. Forsyth* (1874), 41 Md. 389.

¹This accords with Mellor's third rule as laid down in *Jones v. Just*, L. R. 3 Q. B. 197, as follows: "*Thirdly*. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer." *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

The American cases are fully in accord.

In *Seitz v. Brewers' Refrigerating Mach. Co.* (1891), 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. R. 46, plaintiff and defendant entered into a written contract by which defendant agreed to supply to plaintiff "a No. 2 size refrigerating machine, as constructed" by the defendant for a certain sum of money. The contract was silent as to warranty. In an action by the seller to recover the price, the buyer sought to establish

false representation by the seller's agents as to the refrigerating capacity of the machine, but failed to establish it. There was evidence that some time after the contract had been entered into, the buyer had requested an express warranty as to the capacity of the machine, which the seller had declined to give. The seller also insisted that a warranty of fitness would be implied, but the trial court directed a verdict for the plaintiff. Defendant brought error to the supreme court of the United States, where the judgment below was affirmed. Said the court, by Fuller, C. J.: "Failing in respect of the alleged express warranty, plaintiff in error contends, secondly, that there was an implied warranty, arising from the nature of the transaction, that the machine should be reasonably fit to accomplish certain results, to effect which he insists the purchase was made. It is argued that the evidence tended to establish that the plaintiff knew that the defendant had been cooling his brewery with ice, and that the object of obtaining the machine was to ren-

§ 1350. — Nor when qualities are specified by the buyer.
For like reasons there will be no warranty of fitness implied, although the use be known and the seller is the manufact-

der unnecessary the expense of purchasing ice for that purpose; and that unless the machine would cool it to the same extent, or about the same, as the ice did, it would be worthless so far as he was concerned. It is not denied that the machine was constructed for refrigerating purposes, and that it worked and operated as a refrigerating machine should; but it is said that it did not so refrigerate as to reduce the temperature of the brewery to 40° Fahrenheit, or to a temperature which would enable defendant to dispense with the purchase of ice.

"The rule invoked is that where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Benjamin on Sales, § 657; Addison on

Contracts, book II, ch. VII, p. 977; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Dist. of Columbia v. Clephane*, 110 U. S. 212; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Hoe v. Sanborn*, 21 N. Y. 552; *Deming v. Foster*, 42 N. H. 165.

"In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance.

"This is not the case of an alleged defect in the process of manufacture known to the vendor but not to the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, proper and efficacious for that use, but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed.

"In short, there was no express warranty that the machine would cool 150,000 cubic feet of atmosphere to 40° Fahrenheit, or any other temperature, without reference to the construction of the particular brewery or other surrounding circumstances, and, if there were no actual warranty, none could be imputed.

"We may add that in the light of

urer, where the buyer has expressly specified the quality, dimensions or characteristics which the article to be supplied shall possess, the materials of which it is to be made, or the

all the evidence in the record, treated as competent, we think no verdict could be permitted to stand which proceeded upon the ground of the existence of such a warranty as is contended for. The alleged antecedent representations as to whether the machine possessed sufficient refrigerating power to cool this brewery were no more than expressions of opinion, confessedly honestly entertained, and dependent upon other elements than the machine itself, concerning which plaintiff in error could form an opinion as well as defendant; and the conduct of plaintiff in error in demanding, two days after the contract was executed, a written guaranty that the machine company would cool his building to $3\frac{1}{2}^{\circ}$ Reaumur (or 40° Fahrenheit), and keep it at that all the time, and in acquiescing in the company's refusal to give the guaranty for reasons stated, and in thereupon afterwards ordering the company to go on with the work, as exhibited in the correspondence between the parties, seems to us to justify no other conclusion than that reached by the verdict."

In *McCray Refrigerator & Cold Storage Co. v. Woods* (1894), 99 Mich. 269, 58 N. W. R. 320, 41 Am. St. R. 599, plaintiff, the manufacturer of the "McCray patent system of refrigeration," made a written contract, silent as to warranty, to supply to defendants in their refrigerator the plaintiff's "system" for a given sum of money. The "system" was put into defendants' refrigerator, but in an action for the price de-

fendants insisted that it did not answer the purpose. It was held that parol evidence was not admissible to show an express warranty, and that the contract showed nothing from which a warranty could be implied that it was fit for the purposes of a refrigerator or would keep meats for any particular length of time. Two judges dissented.

In *Goulds v. Brophy* (1889), 42 Minn. 109, 43 N. W. R. 834, 6 L. R. A. 392, plaintiffs were manufacturers of well-augers of a certain kind, known as the "Challenge," and of which they made several sizes. They published a catalogue which described and illustrated the augers and gave prices. The catalogue stated: "These augers have been on the market too long and are too well known to need any lengthy explanation or guaranty on our part. We would simply say that our auger is designed to work in soft material only, and for a low-priced auger outfit the Challenge is equal to any." From this catalogue defendant ordered one of the large sizes, but plaintiffs replied saying that they would not recommend one so large. Defendant then ordered a smaller size, but plaintiffs again replied pointing out the disadvantages of one so large. Defendant then ordered one still smaller, which plaintiffs sent. In an action for the price defendant insisted that the machine was not suitable for the purpose of boring wells, and that there was a breach of implied warranty. Judgment below was for plaintiff, and defendant appealed. Judgment was affirmed. The court,

method by which it is to be produced. The buyer here evidently relies upon his own knowledge or judgment and not upon the judgment, knowledge or experience of the seller. In

adopting the statement in *Leake on Contracts*, 404, said that, "if an order be given for a specific article of a recognized kind or description, and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so."

In *Diebold Safe Co. v. Huston* (1895), 55 Kan. 104, 39 Pac. R. 1035, 28 L. R. A. 53, plaintiff in writing ordered a "No. 4 fire-proof safe," "to be one of your latest styles, with all your latest improvements, and to be as per your illustrated catalogue," with dimensions and interior arrangement as specified. Sometime afterward a fire occurred and the contents of the safe were destroyed. The action was by the buyer to recover damages for an alleged warranty that it was fire-proof and suitable for use as such. It was held that if the safe delivered was of the kind described—and of this there was no question,—there was no implied warranty that it would protect its contents from fire during any definite period or under any definite circumstances.

In *Tilton Safe Co. v. Tisdale* (1875), 48 Vt. 83, defendant gave to the plaintiffs, who were manufacturers of safes, a written order for a "No. 4 safe with combination lock," and plaintiffs sent a safe conformable to the order. Held, that there would be no warranty implied as to the merits or usableness of the lock, but only that it should be such as the order called for.

In *Lukens v. Freund* (1882), 27 Kan. 664, 41 Am. R. 429, it appeared that

plaintiff, a farmer, was in the habit of buying bran for his stock at defendant's mill. On a certain day he bought a sack of bran for forty cents; in this bran, unknown to plaintiff or defendants, two copper clasps of a kind used about the mill had accidentally fallen; the clasps were swallowed by one of plaintiff's cows and killed her. The action was for damages for breach of implied warranty of fitness. The court held that it was a sale of a definite, ascertained and existing article, namely, bran; and that though the seller was the manufacturer and knew the purpose, there was no warranty of fitness; that if the seller had known of the existence of the foreign substance and concealed it, there might be an action for fraud [as in *French v. Vining*, 102 Mass. 132, 3 Am. R. 440, where defendant, knowing that white lead paint had been spilled upon his hay, though he had tried to remove it, sold the hay to plaintiff to be fed to his cow without disclosing the fact that the paint had been spilled upon it, and was held liable in tort for the death of the cow caused by eating the hay, from which it appeared that defendant's efforts to remove the paint were ineffectual], but as the sellers had no such knowledge and as the jury found they were not negligent or careless, there could be no recovery. Other grounds also were suggested by the court upon which their judgment might be sustained.

In *Jarecki Mfg. Co. v. Kerr* (1895), 165 Pa. St. 529, 30 Atl. R. 1019, 44 Am. St. R. 674, defendant bought of plaintiff, a dealer, disclosing the con-

all these cases if the buyer doubts the sufficiency of the article which he orders or is unwilling to rely upon his own experience or knowledge, he must exact an express warranty: none will be implied.¹

templated use, a quantity of a well-known and ascertained kind of pipe. It proved to be unfit for the purpose, and an implied warranty was insisted upon, but the court held that the case fell within the third rule as laid down by Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. 197, and that therefore no warranty was implied.

In *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428, there was a sale of a certain drove of hogs, inspected by the buyer, but known to be intended for the New York market, for which they proved unfit. *Held*, that there was no implied warranty of fitness.

See further, that no warranty is implied on sale of a known, described or defined article, which is actually furnished, *Byrd v. Campbell Printing Pr. Co.*, 90 Ga. 542, 16 S. E. R. 267; *Grand Ave. Hotel Co. v. Wharton* (1897), 79 Fed. R. 43, 24 C. C. A. 441, 49 U. S. App. 108; *Milwaukee Boiler Co. v. Duncan* (1894), 87 Wis. 120, 58 N. W. R. 232, 41 Am. St. R. 33; *Case Plow Works v. Niles* (1895), 90 Wis. 590, 63 N. W. R. 1013; *Cosgrove v. Bennett* (1884), 32 Minn. 371, 20 N. W. R. 359; *Bancroft v. San Francisco Tool Co.* (1898), 120 Cal. 228, 52 Pac. R. 496; *Gregg v. Page Belting Co.* (1898), 69 N. H. 247, 46 Atl. R. 26; *Port Carbon Iron Co. v. Groves* (1871), 68 Pa. St. 149; *Mason v. Chappel* (1860), 15 Gratt. (Va.) 572; *Walker v. Pue* (1881), 57 Md. 155.

¹In *Milwaukee Boiler Co. v. Duncan* (1894), 87 Wis. 120, 58 N. W. R. 232, 41 Am. St. R. 33, there was a

contract for a boiler containing definite specifications respecting its construction and the size and character of its several parts. There was also a clause whereby the seller did "guaranty the boiler to be a first-class job." The action was for the last instalment of the price, and the defense, *inter alia*, was want of fitness, but the court said it was plain "that the defendant got the exact article or thing he bargained for; and, although it may have been stated that it was required for a particular purpose, still, as he did not exact an express warranty, he took the risk of its fitness for the intended use, and no warranty in that respect can be implied."

In *Curwen v. Quill* (1896), 165 Mass. 373, 43 N. E. R. 203, defendants submitted drawings of a machine they wanted made by plaintiffs. Plaintiffs knew nothing about the construction of such a machine, but upon defendants' request their draftsman made a model of the machine from the drawings submitted, and plaintiffs constructed the machine. There was no evidence that defendant relied on the knowledge or skill of the plaintiff on his draftsman. *Held*, that plaintiff may recover notwithstanding the machine would not do the work desired.

In *City & Suburban Ry. Co. v. Basshor* (1896), 82 Md. 397, 33 Atl. R. 635, plaintiffs contracted to manufacture and erect five boilers, two hundred horse power each, in accordance with certain specifications, in

§ 1351. — Specification by seller.—It is otherwise, of course, where the seller is relied upon to furnish the specifica-

which occurred the following clause: "At the water tube boilers standard factory (11½ sq. ft. per H. P.) these boilers will give 1000 H. P." *Held*, that this did not oblige plaintiffs to furnish boilers which would give a heating surface of two thousand three hundred square feet each, since the amount of heating surface was clearly shown by the specifications, which rendered it merely a matter of calculation.

In *Wisconsin Pressed Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. R. 165, 60 Minn. 401, 51 Am. St. R. 539, the buyer ordered a quantity of brick of a manufacturer which were expressly stipulated to be of the grade known as common, to be of good quality and equal to a sample shown. The seller knew the purpose for which the buyer intended to use them, but it was held that if the brick furnished were of the kind specified no warranty of fitness could be implied.

So in *Berthold v. Seevers Mfg. Co.*, 89 Iowa, 506, 56 N. W. R. 669, a quantity of piling was ordered, but the buyer, instead of leaving the seller to supply what he thought suitable, expressly stipulated what the quality, material and dimensions should be. *Held*, that no implied warranty of fitness would arise.

In *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 61 N. W. R. 655, 27 L. R. A. 96, there was a contract to furnish paving stones according to specifications, a copy of which was given to the seller. It was held that there was no implied warranty that the stones would be fit for the purposes of the buyer.

In *Ricketts v. Sisson* (1840), 9 Dana

(Ky.), 358, 35 Am. Dec. 141, the order was for a steam cylinder to be constructed according to the buyer's specifications, though known to be designed for a particular use for which it proved insufficient. *Held*, that there was no implied warranty of fitness on the part of the maker. Said the court: "It cannot be admitted that an artificer of any sort is to be considered as undertaking that any machine, instrument or vessel which he makes for the use and by the direction of another, and according to specifications furnished by his employer, shall answer the purpose for which it was designed by the projector. It is the proprietor, the man who designs the instrument, and controls its material, shape and mode of construction, who is responsible for its adaptation in material, shape and mode of construction to the end for which it is intended. The artificer, who actually constructs it, is only bound to do his work in a substantial, workmanlike and skillful manner, and to pursue the specification in the contract or the direction of his employer, in regard to material, shape and mode of construction. If he does this, he is entitled to a reasonable reward for his labor, though the machine, instrument or vessel may wholly fail to perform its intended office."

See also to like effect: *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. E. R. 359; *Cunningham v. Hall* (1862), 4 Allen (Mass.), 268; *Archdale v. Moore* (1858), 19 Ill. 565.

A fortiori, is the seller not liable where he expressly warned the buyer that the time and method which he

tions as being those suited to the needs of the buyer.¹ Here, clearly, the general rule applies.

§ 1352. — Manufacturer warrants kind, materials and workmanship.— But though there is no implied warranty of fitness in the case of the order of a specified or ascertained article, as seen in the preceding section, there is still an implied warranty on the part of the manufacturer that the article which he supplies shall be of the kind agreed upon, and that it shall be constructed of good materials and in a workmanlike manner.²

§ 1353. — Also that goods are new and of his own make. He also impliedly warrants, in the absence of anything to show a contrary intention, that the goods which he supplies are new,³ and of his own manufacture.⁴

§ 1354. Warranty of fitness by breeder or grower.— The same general principles apply to sales by the grower or breeder of the thing sold. If the buyer informs the seller of his purpose, leaving to the latter the determination of that which will supply the need, and necessarily relying upon the seller's judgment rather than his own, the seller will be held to an implied warranty that the thing which he supplies will be suitable to the purpose; as, for example, that the seed that he sells will

specified were not suitable. *Mattoon v. Rice* (1869), 102 Mass. 236.

¹*City of Elgin v. Shoenberger*, 59 Ill. App. 384; affirmed, *Shoenberger v. City of Elgin* (1896), 164 Ill. 80, 45 N. E. R. 434; *Iroquois Furnace Co. v. Wilkin Mfg. Co.* (1899), 181 Ill. 582, 54 N. E. R. 987.

²*Little v. Van Syckle* (1898), 115 Mich. 480, 73 N. W. R. 554; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. R. 834, 6 L. R. A. 392; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. R. 359; *Ricketts v. Sisson*, 9 Dana (Ky.), 358, 35 Am. Dec. 141; *Archdale v. Moore*, 19 Ill. 565; *Union Hide & L. Co. v.*

Reissig, 48 Ill. 75; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

³Manufacturer or dealer warrants that article shall be new and not second hand. *Grieb v. Cole*, 60 Mich. 397, 27 N. W. R. 579, 1 Am. St. R. 533. But one who orders new machinery and knowingly accepts second-hand machinery waives the defect. *Aultman-Taylor Co. v. Ridenour* (1896), 96 Iowa, 638, 65 N. W. R. 980.

⁴*Johnson v. Raylton*, 7 Q. B. Div. 438.

grow, or that an animal which he supplies is competent as a breeder.¹

§ 1355. —. But, on the other hand, where these elements are lacking, where the buyer relies on his own judgment, where a definite and ascertained article is agreed upon, and the buyer gets the very thing he bargained for, there will be no warranty implied that it is suitable, notwithstanding that the seller was the grower and knew the purpose of the buyer.²

And what is true of the grower or producer is equally true of the dealer in like articles under similar circumstances.

¹ In *Shaw v. Smith*, 45 Kan. 334, 25 Pac. R. 886, 11 L. R. A. 681, Shaw, a dealer, undertook to supply Smith with flax-seed for sowing, and Smith agreed to sow a certain acreage and sell back to Shaw all the product at a fixed price. The seed was supplied and Smith duly sowed it, but it failed to germinate. It was held that there was an implied warranty that the seed should be fit for the purpose. The court cited and relied upon cases, cited in section 1334, *ante*, holding that where the seller undertakes to supply seed of a certain kind there is an implied warranty that it is of that kind, *i. e.*, that it will produce vegetables or fruits of the kind of which it purports to be the seed. *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. R. 438, 38 N. J. L. 496; *White v. Miller*, 7 Hun, 427, 71 N. Y. 118, 27 Am. R. 13; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. R. 136; *Whitaker v. McCormick*, 6 Mo. App. 114. To like effect: *Hoffman v. Dixon* (1900), 105 Wis. 315, 81 N. W. R. 491, 76 Am. St. R. 916, also cited in § 1334, *ante*.

And where a dealer in horses sold a stallion, knowing that the buyer relied on the seller's judgment to supply one suitable for a breeder,

there was held to be an implied warranty that the horse furnished was so suitable. *Merchants' Bank v. Frazee*, 9 Ind. App. 161, 36 N. E. R. 378, 53 Am. St. R. 341. So in *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. R. 135, 37 Am. St. R. 199. Compare with cases in following note.

As to the construction of such warranties, see "Construction of Warranties," *ante*, § 1250.

² See *ante*, § 1350. In *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. R. 705, 22 L. R. A. 187, 39 Am. St. R. 864, though the sellers of a bull were stock-breeders and raised the bull, and knew that the buyers bought him for use as a breeder, there was held to be no implied warranty that he was such, it appearing that the buyers saw and inspected the bull before purchase, exacted no warranty, did not ask the sellers' judgment or opinion respecting his capacity, but bought a particular and ascertained animal and received the identical animal that they bought.

The same rule was applied to the sale of a cow in *Scott v. Renick*, 1 B. Mon. (Ky.) 63, 35 Am. Dec. 177 (though here the sellers were not the breeders); and of a bull-calf, in *White v.*

g. Fitness for Food.

§ 1356. **Sale by dealer of provisions for consumption by buyer implies warranty of fitness for food.**—The question of implied warranty upon a sale of articles of food seems to be involved in some uncertainty. It is, practically everywhere, agreed that, where a dealer or ordinary trader sells goods for immediate consumption by the buyer, an implied warranty arises that the goods are wholesome and fit for human food.¹ Blackstone declares the rule more broadly, saying that “in contracts for provisions it is always implied that they are wholesome;”² and this rule has been often quoted in the earlier American cases, though it has also been frequently asserted that the American cases were based upon a misconception of Blackstone’s meaning.³

§ 1357. — **How when seller not a dealer.**—In a leading case⁴ in Michigan, it was expressly held that a warranty arises upon a sale for consumption by the buyer, although the seller

Stelloh, 74 Wis. 435, 43 N. W. R. 99; and of a stallion, in *Wood v. Ross* (Tex. Civ. App.), 26 S. W. R. 148; and of cabbage seed, in *Shisler v. Baxter*, 109 Pa. St. 443, 58 Am. R. 738 (stated *ante*, § 1314, note).

¹See *Wiedeman v. Keller* (1898), 171 Ill. 93, 49 N. E. R. 210; *Howard v. Emerson*, 110 Mass. 320, 14 Am. R. 608; *Divine v. McCormick*, 50 Barb. (N. Y.) 116; *Moses v. Mead*, 1 Denio (N. Y.), 378, 43 Am. Dec. 676; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. R. 372, 16 Am. St. R. 753; *Burch v. Spencer*, 15 Hun (N. Y.), 504; *Hart v. Wright*, 17 Wend. (N. Y.) 267, 18 id. 449; *Hyland v. Sherman*, 2 E. D. Smith (N. Y.), 234; *Goad v. Johnson*, 6 Heisk. (Tenn.) 340; *Ryder v. Neitge*, 21 Minn. 70; *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60, 23 N. W. R. 459, 58 Am. R. 327; *Copas*

v. Provision Co., 73 Mich. 541, 41 N. W. R. 690; *Craft v. Parker*, 96 Mich. 245, 55 N. W. R. 812; *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Williams v. Slaughter*, 3 Wis. 347.

²Com., III, 166.

³See, for example, the discussions in *Green v. Ashland Water Co.* (1898), 101 Wis. 258, 77 N. W. R. 722, 43 L. R. A. 117, 70 Am. St. R. 911, and *Hanson v. Hartse* (1897), 70 Minn. 282, 73 N. W. R. 163, 68 Am. St. R. 527.

⁴*Hoover v. Peters* (1869), 18 Mich. 51. In this case Peters had sold to Hoover and others the carcasses of three hogs which he knew they intended to use as food in their lumber camp. In an action to recover the price, the defense was that the hogs proved to be unfit for food. The case does not show what the business of Peters was, other than that he was not a dealer in meats. The argu-

is not a dealer or trader in such articles. This case, however, stands practically alone, and the clear weight of the authorities is certainly to the effect that where the seller is not a dealer, or, though a dealer, if he sells to another dealer as an article of merchandise merely and not for consumption by the buyer, no warranty that the goods are fit for food arises.¹ An action for

ments assume him to have been a farmer. No claim of fraud was made. The majority of the court, *i. e.* Cooley, Graves and Campbell, JJ., concurred in repudiating the distinction between dealers and non-dealers, holding that "any purchase for domestic use is protected." Christianity, J., dissented. In *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. R. 538, 1 Am. St. R. 472, the court refer to *Hoover v. Peters* as the only case they have been able to find which supports this view, and decline to follow it. In *Sinclair v. Hathaway* (1885), 57 Mich. 60, 23 N. W. R. 459, 58 Am. R. 327, it was held that where a baker sold bread to a bread peddler who sold directly to the consumer, there was an implied warranty between the baker and the peddler that the bread was fit for food. The court said that bread could not be treated as an article of commerce, but was designed for immediate consumption as food, and was of no use unless it was fit for food.

In *Copas v. Provision Co.*, 73 Mich. 541, 41 N. W. R. 690, the seller was a packer and manufacturer of "sweet pickled hams;" the buyer was a local market-man who ordered goods of the seller and paid for them before he had an opportunity for inspection. The goods proved to have been defectively prepared. The court held the seller to an implied warranty that they were fit for food. Whether the court were correct as to the form of

the warranty or not can be of little practical consequence, because there would under the circumstances be at least a warranty of *merchantability* (*ante*, § 1340), and the consequences could not have been materially different.

In *Craft v. Parker* (1893), 96 Mich. 245, 55 N. W. R. 812, 21 L. R. A. 139, the question arose between the consumer and the local dealer of whom he bought. The dealer was also the manufacturer of the food—spiced bacon,—and the case was therefore within the clear rule of liability.

¹ In *Howard v. Emerson* (1872), 110 Mass. 320, 14 Am. R. 608, a farmer sold a certain cow to a butcher and market-man knowing that the latter intended to kill and sell the cow for beef. There was no express warranty and no fraud, and it was held that the law would not imply a warranty that the cow was fit for food. *Needham v. Dial*, 4 Tex. Civ. App. 14, 23 S. W. R. 240, is practically identical. So is *Goad v. Johnson*, 6 Heisk. (Tenn.) 340.

In *Giroux v. Stedman* (1888), 145 Mass. 439, 14 N. E. R. 538, 1 Am. St. R. 472, two farmers sold dressed pork to a family for domestic use. The sellers knew that their hogs had been exposed to the hog cholera, and that some of them had it; but there was no evidence that the animals killed had it, and there was evidence that, even if they had, the meat was not necessarily unwholesome. The ac-

deceit may, indeed, be maintained in such cases upon proof of knowledge by the seller,¹ but no *warranty* exists.

§ 1358. — Other circumstances raising warranty.—

Other circumstances may, however, exist upon which a warranty may be founded. Thus, where the contract is executory and the buyer has had no opportunity for inspection, a warranty that the goods are merchantable will arise, and a warranty of merchantability must in many cases certainly be tantamount to a warranty that the goods are fit for food.² So

tion was for damages to the buyers by being made sick. The court below held that there could be no recovery unless the sellers knew that the meat was not wholesome, and the supreme court affirmed the judgment, saying: "In the case at bar, the defendants were not common dealers in provisions or market-men. They were farmers selling a portion of the produce of their farms. No representation of the quality of the meat sold was made by them. In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining at his peril the condition of the articles sold, and of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for the purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser." The court relied upon *Howard v. Emerson*, *supra*, and *Burnby v. Bollett*, 16 Mees. & Wels. 644. *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339, was distinguished, as the seller there had knowledge. *Hoover v. Peters*, 18 Mich. 51, *supra*, was denied, and *French v. Vining*, 102 Mass. 132, 3 Am. R. 440, was distinguished.

No warranty is implied when the

article is sold between dealers as merchandise and not for immediate consumption by the buyer. *Hanson v. Hartse* (1897), 70 Minn. 282, 73 N. W. R. 163, 68 Am. St. R. 527 (sale by a farmer to a butcher of a fat steer); *Ryder v. Neitge*, 21 Minn. 70 (venison); *Humphreys v. Comline*, 8 Blackf. (Ind.) 516 (molasses); *Jones v. Murray*, 3 T. B. Mon. (Ky.) 83 (pork and bacon); *Hyland v. Sherman*, 2 E. D. Smith (N. Y.), 234 (onions); *Goldrich v. Ryan*, 3 E. D. Smith, 324 (cattle); *Rinchler v. Jeliffe*, 9 Daly (N. Y.), 469 (meat); *Miller v. Scherder*, 2 N. Y. 262 (beef); *Moses v. Mead*, 1 Denio (N. Y.), 378, 43 Am. Dec. 676 (beef); *Hart v. Wright*, 17 Wend. (N. Y.) 267 (flour); *Wright v. Hart*, 18 Wend. 449 (flour); *Winsor v. Lombard*, 18 Pick (Mass.) 57 (mackerel).

¹ *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339; *Moses v. Mead*, 1 Denio (N. Y.), 378, 43 Am. Dec. 676; *French v. Vining*, 102 Mass. 132, 3 Am. R. 440; *Divine v. McCormick*, 50 Barb. (N. Y.) 116; *Burch v. Spencer*, 15 Hun (N. Y.), 504; *Joplin Water Co. v. Bathe*, 41 Mo. App. 285.

² See *ante*, § 1340; *Copas v. Provision Co.*, *supra*, 73 Mich. 541, 41 N. W. R. 690.

On a sale by sample of canned lobster, there is an implied warranty

where the seller's judgment is relied upon to determine what the goods may be, a warranty that they will be fit for a disclosed purpose, that is, for food, may be implied as in other cases falling under a like reason.¹

§ 1359. No implied warranty of purity of water furnished by water company.—On the other hand, it has been held by the court in Wisconsin, though that court also announced doctrines opposed to the implied warranty in the case of food, that there is no implied warranty of the purity of water supplied for domestic use by a water company.² Said the court: "It is not a commodity kept for sale in the strict sense of the term, but is free to every one, in nature's reservoirs, like light and air. It is taken directly or indirectly from a common source of supply. The immediate source, as in this case, is usually selected in advance and fixed by contract, leaving the mere service of a carrier to be performed, of taking the water from such source and distributing it to the consumers. To say that the person or corporation performing that service shall be burdened with an implied warranty of the quality of the thing carried and distributed would be treating the transaction as a sale, strictly so called, and then applying an exception to the doctrine of *caveat emptor* not supported by good reason, or any authority we are able to find, or any to which our attention has been called. It would burden such public service in a way that would be destructive of private enterprise in that line, and render public enterprise in the same direction so attended with dangers as to discourage a service that has become a necessity in all communities of any considerable size, and which

that it is merchantable and fit for food. *Leggett v. Young* (1888), 29 New Bruns. 675.

¹ See *ante*, § 1344; *Beer v. Walker*, 46 L. J. C. P. 677, where there was a contract by a wholesale provision dealer to keep a local dealer in another town supplied by rail weekly with rabbits. It was held that there

was an implied warranty that the rabbits so furnished should be fit for food. See also *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. R. 372, 16 Am. St. R. 753.

² *Green v. Ashland Water Co.* (1898), 101 Wis. 258, 77 N. W. R. 722, 70 Am. St. R. 911, 43 L. R. A. 117.

promotes to a high degree the welfare and happiness of individuals in communities great or small. If distributors of water under public franchises be held strictly accountable for the exercise of ordinary care not to place before their customers an unwholesome article under circumstances liable to induce persons, in the exercise of ordinary care, to use it for drinking or other domestic purposes in ignorance of the dangers attending the use, and held liable for deceit in such transactions, and the law be firmly administered along those lines, the safety of individuals, as affected by public water service, will be as well promoted as is consistent with the continuance of such service, whether performed by strictly public or by *quasi*-public agencies."

§ 1360. —. There may undoubtedly, however, be cases in which the sale of water for drinking and similar uses would properly be put upon the same ground as the sale of articles of food for consumption by the buyer and would be subject to the same implied warranty.

CHAPTER VI.
OF PERFORMANCE BY THE PURCHASER.

§ 1361. In general.

1362. How subjects classified.

§ 1361. **In general.**—Having now considered what duties in the way of performance the contract and the law impose upon the seller, it next becomes material to determine what duties in the line of performance are imposed upon the buyer. Certain of these will be found to be mere correlatives of the duties imposed upon the seller; others will be new and original.

§ 1362. **How classified.**—The duties of the buyer are chiefly two, namely:

1. To accept the goods; and
2. To pay the price.

Each of these will be made the subject of a separate chapter.

CHAPTER VII.

OF ACCEPTANCE BY THE BUYER.

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| <p>§ 1363. In general.</p> <p>1364. What meant by acceptance.</p> <p>1365. In what cases requisite.</p> <p>1. <i>Acceptance in Case of Present Sale.</i></p> <p>1366. Acceptance here contemporaneous with contract.</p> <p>1367. Receipt where delivery postponed.</p> <p>1368. Waiver of irregular delivery.</p> <p>2. <i>Acceptance in Case of Executory Contract.</i></p> <p>1369. Necessity and nature of acceptance here.</p> <p>1370, 1371. What is meant by acceptance in these cases.</p> <p>1372. What buyer is bound to accept.</p> <p>1373. When and where buyer is bound to accept.</p> <p>1374. Waiver of irregular delivery.</p> <p>1375, 1376. Buyer's right of inspection before acceptance.</p> <p>1377. — Time, place and method of test.</p> <p>1378. — Right to use or consume goods in test.</p> <p>1379. Express acceptance.</p> <p>1380, 1381. Implied acceptance — Retention beyond reasonable time.</p> | <p>§ 1382. — Retention beyond agreed time.</p> <p>1383, 1384. — Acceptance after test agreed upon — Failure to give notice.</p> <p>1385, 1386. — Waiver of the notice.</p> <p>1387. — Acts of ownership indicating acceptance.</p> <p>1388. Effect of acceptance.</p> <p>1389. — As waiver of time.</p> <p>1390. — As waiver of quantity.</p> <p>1391. — As waiver of quality —</p> <p style="padding-left: 20px;">1. Where there was no warranty.</p> <p>1392, 1393. — 2. Where there was implied warranty or condition.</p> <p>1394, 1395. — 3. Where there was an express warranty.</p> <p>1396. Effect of acceptance where contract provides that it shall be conclusive.</p> <p>1397. Effect of acceptance when brought about by fraud, mistake or promise to remedy.</p> <p>1398-1401. Effect of acceptance or rejection in part.</p> <p>1402, 1403. Rejection — Method and effect.</p> |
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§ 1363. In general.— The first duty imposed upon the buyer of goods, when the seller has performed or is ready to perform the contract on his part, is to accept the goods which are the subject-matter of the contract.

§ 1364. **What is meant by acceptance.**—The idea of acceptance is one involving somewhat complex elements. It has both a mental and physical aspect. It means more than merely to receive the goods, for the latter is purely a physical act. It requires also the element of mental assent. It bears the same relation to receiving the goods which transferring the title to them bears to the merely physical act of delivery. It signifies the mental and physical consent and assent of the buyer to the transfer of title and delivery of possession of the goods in question by the seller to the buyer in pursuance and performance of the contract.

§ 1365. **In what cases requisite.**—Acceptance is an incident of all sales, whether present or executory; but the time, method and circumstances differ in the two cases, and suggest separate consideration.

1. *Acceptance in Case of Present Sale.*

§ 1366. **Acceptance here contemporaneous with the contract.**—Acceptance in the case of a present sale of specific and ascertained goods is, as a mental act at least, contemporaneous with and an element of the contract of sale itself. As has been already seen,¹ the assent of the parties to the sale of specific goods is, as between themselves, sufficient to transfer the title. By assenting to the sale, therefore, the buyer assents to accept and does accept the title to those specific goods, and the sale is consummated at once on both sides. Nothing is now left but the physical acts of delivery and receipt, which will also be practically contemporaneous with the sale, unless, for some reason, they are expressly postponed. If so postponed, the duty still remains upon the seller to deliver and upon the buyer to receive the goods. These acts are substantially the precise equivalents of each other, and the consideration in an earlier chapter² of the seller's duty to deliver leaves little further to be said regarding the buyer's duty to receive.

¹ See *ante*, § 483.

² See *ante*, § 1116 *et seq.*

§ 1367. **Receipt where delivery postponed.**— Where delivery of specific goods is postponed, as suggested in the preceding section, it is the duty of the buyer to receive them at the time and place fixed for their delivery. What this time and place are have already been determined.¹

Little of discretion is here left to be exercised by the purchaser. The goods are his, and he should receive them as agreed. All occasion for discretion is not, however, excluded. The *identity* of the goods tendered with those purchased is open for examination, and the buyer is clearly under no obligation to receive any others than those so agreed upon. The right of examination and reasonable opportunity to make it, when necessary to determine this identity, must clearly belong to the purchaser.

The *condition* of the goods tendered may also be open to determination; for the buyer is not bound to receive the goods unless they are in the condition which the contract contemplated; as where the seller, after the sale and before delivery, is to do something with or to them before they are to be received.

§ 1368. **Waiver of irregular delivery.**— Although the buyer is thus not bound to receive other goods than those purchased; although he is not bound to receive them at a different time or place than that agreed upon; although he is under no obligation to accept delivery in a different manner or condition than that specified, he may waive his right in any of these cases and receive the goods notwithstanding the irregularity. This waiver need not be express; it may be implied from circumstances, and it will be so implied whenever the conduct of the buyer is inconsistent with an intention to reject the goods. The most common form of waiver is that of retention without objection, and the rule is abundantly settled that if, without objecting within a reasonable time, the buyer does receive and retain the goods, he will be deemed to have waived the irregularities and he cannot afterwards reject the goods.²

¹ See *ante*, §§ 1124 *et seq.*, 1129 *et seq.* ² See *post*, §§ 1380, 1381.

2. *Acceptance in Case of Executory Contract.*

§ 1369. **Necessity and nature of acceptance here.**—Acceptance in the case of executory contracts for the sale of unascertained goods involves an element of great importance, no longer open in the case of the present sale of a specific chattel. At the time of making the executory contract no title to any specific chattel passes thereby, for the reason that the chattel has not yet been ascertained. It remains, as has been seen, for the seller, on his part, to appropriate a chattel to the contract, and for the buyer to assent to that appropriation.¹ Resolved into its elements, this transaction will be found to involve four elements of importance: appropriation of the chattel and its delivery, by the seller; assent to that appropriation and the receipt of the chattel, by the purchaser. Appropriation and delivery by the seller have already been considered;² assent to the appropriation and the receipt of the goods by the buyer remain to be considered. Taken together they constitute the duty of the buyer.

§ 1370. **What is meant by acceptance in these cases.**—Performance by the buyer, therefore, in its fullest form, is clearly in these cases an act involving two distinct elements — mental assent and physical reception. Either may exist without the other. The buyer may assent that the goods selected by the seller are the goods to which the contract is to attach — which *satisfy* the contract and the title to which is therefore to vest in him — without actually receiving them into his possession. On the other hand, he may actually receive possession of certain goods without assenting that they are the ones contemplated by the contract.³ To the former act alone the term

¹ See *ante*, § 721 *et seq.*

² See *ante*, § 1116 *et seq.*

³ Thus, in language often quoted with approval, Mr. Benjamin says (Sale, 6th Am. ed., § 703): "When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from object-

ing to them by merely *receiving* them; for receipt is one thing and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time (*Bianchi v. Nash*, 1 M. & W. 545; *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829; *Couston v. Chap-*

“acceptance” is properly applied. It is so used in the statute of frauds, where the buyer is required to receive and accept the goods; and undoubtedly in the strictest sense the term “acceptance” is to be so distinguished.

§ 1371. As matter of fact, however, the term is used with at least three different significations. First, in the sense above mentioned, that the buyer is willing to and does take the title to the goods proffered as being the ones both in kind and quality which he is bound to accept under the contract. Secondly, where the buyer receives the goods into his possession, and then so deals with them that the law declares that he must be presumed to be satisfied with them. Thirdly, where the buyer receives the goods into his possession, and then so deals with them that the law declares that he has accepted the title so that he cannot return them, but that he has not so completely assented to them as to preclude him from asserting that they are not of the kind or the quality which the contract called for and recovering damages therefor.

The application and effect of these various forms will be dealt with in the succeeding sections.

§ 1372. **What buyer is bound to accept—Difference in quality, quantity or kind.**—It has been seen under the head of Delivery that it is the duty of the seller to deliver or offer for delivery such goods only as the contract provided for, and the buyer is under no obligation to accept any others. If, therefore, the seller tenders goods differing in quality, quantity or kind from those which the contract contemplated, the buyer is under no obligation to accept them. This subject has

man, L. R. 2 Sc. App. 250); or if any act be done by the buyer which he would have no right to do unless he were owner of the goods.”

So in *Schloss v. Feltus*, 96 Mich. 619, 55 N. W. R. 1010, it is said: “For the purpose of an acceptance of goods, the vendee must have had an

opportunity of exercising his judgment with respect to the articles sent. The acceptance must be something more than a mere receipt; it means some act done after the vendee has exercised or had the means of exercising his right of rejection.”

been so fully considered in the chapter on Delivery¹ that it is unnecessary to repeat it here.

§ 1373. When and where buyer is bound to accept.—The question of the time and place of acceptance corresponds with the question of the time and place of delivery — the buyer being bound to accept at the time and place at which the seller is bound to deliver. But this subject, like those mentioned in the preceding section, has been so fully treated in the chapter on Delivery² that further consideration here is not necessary.

§ 1374. Waiver of irregular delivery.—Notwithstanding the right of the buyer to insist upon performance by the seller according to the contract, he may waive his right either expressly or impliedly, by accepting something different. Much of the succeeding sections will be devoted to this question of waiver by acceptance; but it may be said, in general terms, that the buyer may waive the provisions of the contract as to quality, kind or quantity; he may accept and become bound to pay for goods he never ordered;³ he may accept more or less than the stipulated quantity;⁴ he may accept goods of a

¹ See *ante*, § 1154 *et seq.* The buyer is, of course, not bound to accept something different from what he ordered) *O'Donohue v. Leggett*, 134 N. Y. 40, 31 N. E. R. 269; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154, and cases cited *ante*, § 1154 *et seq.*, above referred to; but the buyer cannot reject the goods simply because they are not packed as usual where the manner of packing is immaterial. *Forke v. Arms Co.*, — Tex. —, 19 S. W. R. 550.

Where an article delivered does not correspond to the description under which it was sold, the vendee is not bound to accept, and may recover whatever of the purchase price he has paid. *Meador v. Cornell* (1896), 58 N. J. L. 375, 33 Atl. R. 960.

² See *ante*, §§ 1124, 1129 *et seq.* See also *post*, § 1383 *et seq.*

³ Liability for goods not ordered imposed by receiving and retaining them without objection within a reasonable time. *Hobbs v. Massasoit Whip Co.* (1893), 158 Mass. 194, 33 N. E. R. 495; *Indiana Mfg. Co. v. Hayes* (1893), 155 Pa. St. 160, 26 Atl. R. 6; *Thompson v. Douglass* (1891), 35 W. Va. 337, 13 S. E. R. 1015; *Harworth v. Truby* (1890), 138 Pa. St. 222, 20 Atl. R. 942.

⁴ Excess in quantity waived by acceptance. *Ante*, § 1159. But see *Bedell v. Kowalsky* (1893), 99 Cal. 236, 33 Pac. R. 904.

Deficiency in quantity waived by acceptance. *Ante*, § 1161; *Williamette Steam Mills Co. v. Union Lum-*

different kind than those agreed upon;¹ he may accept at a time or a place other than that specified;² and he may signify this acceptance not only expressly but impliedly, and his implied acceptance may be found to have been given where, without dissent within a reasonable time, he receives and retains goods delivered not in conformity to the contract,³ or where he subsequently deals with them as owner.⁴

ber Co. (1892), 94 Cal. 156, 29 Pac. R. 773.

¹ See *post*, § 1390 *et seq.*

² Delivery at different time than that specified may be waived by acceptance. *Ante*, § 1151; *Lee v. Bangs*, 43 Minn. 23, 44 N. W. R. 671; *Reid v. Field*, 83 Va. 26, 1 S. E. R. 395; *Minneapolis Threshing Co. v. Hutchins* (1896), 65 Minn. 89, 67 N. W. R. 807; *Jeffrey Mfg. Co. v. Central Coal Co.* (1899, C. C. D. Ky.), 93 Fed. R. 408.

In *De La Vergne, etc. Co. v. New Orleans, etc. R. Co.* (1899), 51 La. Ann. 1733, 26 S. R. 455, the defendant contracted with the plaintiff to supply it with a large cotton press, to be completed by a certain date. It was not completed on time, but the defendant did not put the plaintiff in formal default and allowed it to go ahead with the work under the impression that the press would be accepted and damages demanded for delay. Finally, when the materials for setting up the press were mostly on the ground, the defendant refused to accept the press at all, and ordered plaintiff to remove its property. *Held*, that the defendant, by its conduct, had put itself under obligation to accept the press, and could only assert its claim for damages.

In *Belcher v. Sellards* (Ky., 1897), 43 S. W. R. 676, a buyer of logs was compelled to advance money to have

them put into the river and rafted. Evidence tended strongly to show that the seller was insolvent. *Held*, that acceptance by the buyer after the time fixed for delivery was not, alone, a waiver of damages for the delay.

In *Graves v. Morse* (1895), 45 Neb. 604, 63 N. W. R. 841, a merchant ordered rubber goods, which were not shipped within a reasonable time, and on going from home he told his clerk not to accept them. The clerk received them and paid the freight. Whether the goods were accepted, *held* to be a question for the jury.

Delivery at different place than that specified may be waived by acceptance. *Ante*, § 1128; *Willard v. Tatum*, 97 Cal. xviii, 31 Pac. R. 912; *Duplanty v. Stokes* (1895), 103 Mich. 630, 61 N. W. R. 1015.

In *Van Valkenburgh v. Gregg* (1895), 45 Neb. 654, 63 N. W. R. 949, a purchaser ordered five cars of corn to be shipped from either of two towns to a point designated by him. *Held*, that receipt of a portion of the goods by the vendee at the point designated by him, the goods being consigned to the vendor, was a waiver of the terms of delivery only as to the portion so received, and did not waive delivery of the remaining goods according to the contract.

³ See *post*, § 1380.

⁴ See *post*, § 1387.

§ 1375. Buyer's right of inspection before acceptance.—The contract in these cases being executory, and the buyer not having had at the time of the contract an opportunity to inspect and agree upon the goods to which the contract is to apply, it is clear that he cannot be compelled to accept goods which the seller alone has selected and tenders until he has had a reasonable opportunity to inspect them in order to ascertain whether they are such as under the contract he is bound to accept,—whether, for example, they are of the kind, quality, condition or amount agreed upon,—whether they conform to the order or the sample, or the description or the warranty given.¹

§ 1376. —. Although, as has been seen in earlier sections,² the seller may be left to make appropriation of goods to the executory contract; and although the buyer may consent in advance that he will accept the goods so appropriated in accordance with the contract;³ and although such an appropriation in pursuance of the contract will operate to pass the title,⁴—these rules are all subject to the important proviso, that the

¹Knoblauch v. Kronschnabel (1872), 18 Minn. 300; Pierson v. Crooks (1889), 115 N. Y. 539, 22 N. E. R. 349, 12 Am. St. R. 831; Demens v. Le Moyne (1890), 26 Fla. 323, 8 S. R. 442; Hudson v. Germaine Fruit Co. (1892), 95 Ala. 621, 10 S. R. 920; Sun Pub. Co. v. Minnesota Type F. Co. (1893), 22 Oreg. 49, 29 Pac. R. 6; Holmes v. Gregg (1890), 66 N. H. 621, 28 Atl. R. 17; Holt v. Pie (1888), 120 Pa. St. 425, 14 Atl. R. 389; Doane v. Dunham (1875), 79 Ill. 131; Schloss v. Feltus (1893), 96 Mich. 619, 55 N. W. R. 1010; Charles v. Carter (1896), 96 Tenn. 607, 36 S. W. R. 396.

In Michigan Stone Co. v. Harris (1897), 54 U. S. App. 137, 27 C. C. A. 6, 81 Fed. R. 928, the defendants contracted to sell to the plaintiffs cer-

tain municipal bonds at certain terms, subject to the approval of the plaintiffs' legal counsel as to their validity, upon evidence furnished by the defendants. The latter tendered the bonds before it obtained all the necessary data bearing on their validity, and the plaintiffs called for the missing data before accepting the bonds. Thereupon defendants sold to other parties. *Held*, that the defendants were not justified in tendering the bonds before furnishing the required data, and then declaring the sale off because they were not accepted.

²See *ante*, § 721 *et seq.*

³See *ante*, §§ 730–732.

⁴See *ante*, §§ 728, 746.

goods so appropriated shall be such as the buyer is bound to accept, and if they are not he need not accept them. As has been already seen in various places,¹ this correspondence of the goods to the kind, description, amount, etc., agreed upon is a condition precedent to the buyer's liability.

§ 1377. — **Time, place and method of test.**— The buyer's right of inspection includes a reasonable time within which to make it, and imposes on him the duty to make it within that time after the goods have been received or tendered for acceptance;² what is reasonable being here, as in other cases, a question of fact dependent upon the circumstances of each case, the situation of the goods, the nature of the business and the customs of the trade.³ The place of inspection, in the absence of a contrary intention, must ordinarily be the place at which acceptance is due — as distinguished from the place of

¹ See *ante*, § 1209 *et seq.*

² *Hudson v. Germaine Fruit Co.* (1892), 95 Ala. 621, 10 S. R. 920; *Black v. Delbridge, etc. Co.* (1892), 90 Mich. 56, 51 N. W. R. 269. In *Gray v. Consolidated Ice Machine Co.* (1897), 103 Ga. 115, 29 S. E. R. 604, it was held that where a machine is sold with a warranty that it will conform to a certain test, and the test is so long delayed that the efficiency of the machine is impaired, the purchaser forfeits his right to sue for breach of warranty. In *Smith v. Barber* (1899), 153 Ind. 322, 53 N. E. R. 1014, it was held that where a contract of sale of machinery provided for a test, by preventing the test the vendee waived performance in that respect.

³ See *post*, § 1381. Where it is the custom of merchants who have bought goods in the original packages not to open them until a sale to customers, an examination then will be in time if such sale is made in the due course of trade. *Doane v. Dunham* (1875), 79 Ill. 131.

So a custom of the Liverpool corn-market that a buyer should object within one day if corn delivered was not equal to sample, after which the right of rejection was lost, was enforced in *Sanders v. Jameson*, 2 C. & K. 557.

Where goods ordered did not arrive at time agreed upon and buyer therefore bought others, so that when goods first ordered did arrive he had no immediate use for them or occasion to open packages, it was held that delay in examining during the period was excused. *Gordon v. Waterous* (1875), 36 Up. Can. Q. B. 321.

In *Tasker v. Crane Co.* (1893), (C. C. N. D. Ill.) 55 Fed. R. 449, there was a contract for the manufacture and sale of gas pipes, to be tested when laid, with reasonable promptness, no mode of testing being given. *Held*, that the customary mode was proper, and that a delay of several months was not reasonable promptness.

receipt where they are separate — the place at which the buyer is finally bound to accept or reject the goods.¹

§ 1378. — Right to use or consume goods in making test.— The right of inspection necessarily involves the right to do those things without which it cannot reasonably and

¹ *Pierson v. Crooks* (1889), 115 N. Y. 539, 22 N. E. R. 349, 12 Am. St. R. 831, is an excellent illustration of the rule. There buyers in New York ordered of sellers in England a quantity of iron to be delivered by the latter "free on board" at Liverpool for shipment to New York. The buyers had no agent at Liverpool and made no examination there; but when the goods reached New York the buyers examined them and rejected part as not according to the order. The sellers contended that the buyers should have made examination at Liverpool, and, not having done so, could not reject the goods at New York. Said the court: "When and at what place the right of inspection was to be exercised was not definitely fixed by the contract. The intention of the parties, when ascertained, is to govern. They might have provided that the inspection should be made either at Liverpool or at New York. The contract is silent on this point, and the defendants insist that, in the absence of express words, the law ascertains and fixes the intention that examination should be made at the place where the defendants were to deliver the iron, to wit, at Liverpool. We are, however, of opinion that where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any spe-

cific provision in the contract, continues until the goods are received and accepted at their ultimate destination, and that the carrier is not the agent of the vendee to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them." *Holt v. Pie* (1888), 120 Pa. St. 425, 14 Atl. R. 389, is to the same effect.

The important case of *Heilbutt v. Hickson*, L. R. 7 C. P. 438, stated *ante*, § 1329, note, is also instructive in this connection. Brett, J., said "that if the time of inspection, as agreed on, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to the sample, return them then and there on the hands of the seller." Affirmed and restated by Brett, J., in *Grimoldby v. Wells*, L. R. 10 C. P. 391, 396. See also *Couston v. Chapman*, L. R. 2 Sc. App. 250; *Mody v. Gregson*, L. R. 4 Ex. 49; *Drummond v. Van Ingen*, 12 App. Cas. 284.

In *Cefalu v. Fitzsimmons-Derrig Co.* (1896), 65 Minn. 480, 67 N. W. R. 1018, defendant ordered a car of bananas from plaintiffs, who were merchants in New Orleans. They were shipped to defendant in Duluth and upon inspection found not to be as ordered, which fact was communicated to plaintiffs by wire. Plaint-

efficiently be accomplished; for example, to unpack or open the goods, to weigh, measure, compare or test them.¹ Where otherwise their character, quality, fitness or condition cannot reasonably be determined—as where mere inspection will not avail,—he has the right to use or consume such amount or quantity as is reasonably necessary to accomplish that purpose; taking care, however, not to make a test where none is necessary, and not in any event to use an unreasonable quantity for the purpose.²

iffs wired back: "Take fruit. Will write." The defendant took and disposed of the fruit. *Held*, that plaintiffs waived an acceptance or rejection of the fruit at St. Paul, which they claimed was the place where it was to be inspected.

¹ Thus in *Holmes v. Gregg* (1890), 66 N. H. 621, 28 Atl. R. 17, it was held that where lumber ordered was sent in box cars, in which the buyer could not examine it, he had the right to unload it for that purpose.

² This question was involved in *Philadelphia Whiting Co. v. Detroit White Lead Works* (1885), 58 Mich. 29, 24 N. W. R. 881, where the buyer had used forty-two out of three hundred barrels of whiting in testing it. The court below left it to the jury to determine whether it could be efficiently tested in any other way, and, if not, whether the amount used was reasonable. The jury found both of these points in the buyer's favor, and the supreme court held the action of the trial court to be correct and affirmed the judgment.

In *Nelson v. Overman* (1897), 19 Ky. L. 161, 38 S. W. R. 882, the defendant purchased several tons of baled hemp from the plaintiff, and opened each bale and used a portion. Upon action being brought for the price he defended on the ground of

inferior quality in the interior of each bale. *Held*, no defense, as it was his duty to reject the shipment after examining enough bales to discover the fraud.

Cream City Glass Co. v. Friedlander (1893), 84 Wis. 53, 54 N. W. R. 28, 36 Am. St. R. 895, 21 L. R. A. 135, is an important case upon the question. There a large quantity (sixty-three tierces, or one hundred and thirteen thousand three hundred and ninety pounds) of soda ash had been shipped from Liverpool, England, to Milwaukee, Wisconsin. On its arrival in December the buyers opened it and immediately gave notice that "on opening it, we find it absolutely unfit for use," and that it was therefore rejected. The seller refused to take it back, and in January or February following the buyers used about six tierces, containing one thousand five hundred to one thousand six hundred pounds, in a test of it for glass-making purposes, for which it had been purchased. They then claimed that this test showed it to be unfit for their purposes, and persisted in rejecting it. In an action by the buyer to recover back the price paid, with freight, the trial court instructed the jury that if the test was unnecessary, or if the buyers used more of the goods than was reason-

§ 1379. **Express acceptance.**—The acceptance by the purchaser may be either express or implied. The former case may be dismissed with brief mention, for, if the buyer has expressly manifested or declared his acceptance of the goods, there can, in the absence of fraud, be ordinarily no further act or evidence of his approval required.¹

ably necessary for the purpose, or if, having once elected to reject the goods, they had since done anything [this use] inconsistent with ownership in the seller, the seller should recover. The jury found for the buyer, but this judgment was reversed by the supreme court. Said the court: "Could the plaintiff, after having decided that the material was wholly unfit, and notified the defendant of its decision and its rejection of the material, proceed to use three-quarters of a ton of the material in making a practical test, and still insist on its right of rejection? It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. Benjamin, Sales (6th ed.), § 703. If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. Benjamin, Sales (6th ed.), § 896; Philadelphia Whiting Co. v. Detroit White Lead Works. 58 Mich. 29, 24 N. W. R. 881. But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not neces-

sary, and the use of the material, therefore, clearly unjustifiable. Now, in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. Churchill v. Price, 44 Wis. 540. They must do no act which they would have no right to do unless they were owners of the goods. Benjamin, Sales (6th ed.), § 703. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness, for the purposes of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected and was owned by defendant. It follows that the judgment must be reversed."

¹ As in *Saunders v. Topp* (1849), 4

The cases giving difficulty, and requiring more particular investigation, are those of implied acceptance.

§ 1380. Implied acceptance — Retention of goods without objection beyond a reasonable time.—The acceptance need not be express. It may be, and, in the cases coming before the courts, ordinarily is, implied or denied in reliance upon the circumstances of the case.

The fact most frequently relied upon as the ground of an implied acceptance is that the buyer, after receiving the goods, has retained them without objection for an unreasonable period. As has been seen, the buyer has the right to inspect the goods, and is then bound to accept them if they conform to the contract, or to reject them if they do not. He is bound, however, to do one thing or the other, and that within a reasonable time; and if he simply remains inactive, neither accepting nor rejecting within a reasonable period, the law will deem his inaction to be acquiescence, and he will not afterwards be permitted to reject.¹

Exch. 390, where the buyer, after examining and counting the articles, said, "It is all right."

¹ *Berthold v. Seevers Mfg. Co.* (1893), 89 Iowa, 506, 56 N. W. R. 669 (lumber not of the dimensions agreed upon); *Mackey v. Swartz* (1883), 60 Iowa, 710, 15 N. W. R. 576 (safe not painted as agreed); *E. A. Moore Furniture Co. v. Sloane* (1897), 166 Ill. 457, 46 N. E. R. 1128 (carpets); *Pennell v. McAfferty* (1877), 84 Ill. 364 (furnace and ventilator); *Carondelet Iron Works v. Moore* (1875), 78 Ill. 65 (iron to be manufactured); *Hobbs v. Massasoit Whip Co.* (1893), 158 Mass. 194, 33 N. E. R. 495 (eelskins); *Chase Elevator Co. v. Boston Tow B. Co.* (1892), 155 Mass. 211, 29 N. E. R. 470 (an elevator). Especially where he exercises acts of dominion over the goods, as, for example, sells them. *Watkins v. Paine* (1876), 57 Ga. 50. See also *Reed*

v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Mason v. Smith*, 130 N. Y. 474, 29 N. E. R. 749; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. R. 349, 12 Am. St. R. 831; *Boyington v. Sweeney*, 77 Wis. 53, 45 N. W. R. 938; *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. R. 777; *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 625; *Olson v. Mayer*, 56 Wis. 551, 14 N. W. R. 640; *Gill v. Benjamin*, 64 Wis. 362, 25 N. W. R. 445; *Pratt v. Peck*, 70 Wis. 620, 36 N. W. R. 410; *Wood Mach. Co. v. Calvert* (1895), 89 Wis. 640, 63 N. W. R. 532; *Foss-Schneider Brew. Co. v. Bullock*, 16 U. S. App. 311, 8 C. C. A. 14, 59 Fed. R. 83; *McCormick Harv. Co. v. Martin*, 32 Neb. 723, 49 N. W. R. 700; *Minnesota Thresher Co. v. Hanson*, 3 N. Dak. 81, 54 N. W. R. 311; *Small v. Stevens* (1889), 65 N. H. 209, 18 Atl.

§ 1381. — What time can be deemed a reasonable one is a question of fact to be determined by the jury in view of all the circumstances of the case.¹

§ 1382. — Retention of goods without objection beyond agreed time.— Instead of leaving the question of time to be determined subsequently in view of the circumstances of the case, the parties may expressly agree, when making the contract, upon the period within which the buyer's right of rejection shall be exercised or be deemed to be foreclosed; and such an agreement will be conclusive upon the buyer² unless its provisions are waived or extended by the seller.

R. 196; *Farrington v. Smith*, 77 Mich. 550, 43 N. W. R. 927; *Childs v. O'Donnell*, 84 Mich. 533, 47 N. W. R. 1108; *Forsaith Machine Co. v. Mengel*, 99 Mich. 280, 58 N. W. R. 305.

Where the buyer delays for an unreasonable time, and in the interval the goods are destroyed by fire, the seller may recover their value of the buyer. *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. R. 938.

In *Auerbach v. Wunderlich* (1899), 76 Minn. 42, 78 N. W. R. 871, defendants sent a telegraphic order to plaintiffs for one hundred boxes. The message, as delivered, read one thousand boxes, which were sent. Defendants declined to take them, and at last plaintiffs agreed to take back the nine hundred and asked that they be returned within two weeks. No response, and plaintiffs wrote again at the end of the two weeks, asking that defendants give the matter their immediate attention. Two weeks later the defendants replied, and offered to return the boxes in two weeks more when they would not be so busy. *Held*, that defendants waived their original right to return the goods by neglecting to comply with the request to return them.

¹ In *South Bend Pulley Co. v. Caldwell & Co.* (Ky., 1899), 54 S. W. R. 12, a lot of pulleys were sold with a warranty. They were wrapped in paper, and the covering of many of them was not removed until just before suit was brought, when it was seen that the wooden blocks had shrunk. *Held*, that the court properly refused to instruct the jury that there could be no recovery on the counter-claim unless there was an offer to return the goods within a reasonable time, the defects being such that they did not develop for some time; and what was a reasonable time under the circumstances was held to be for the jury to say.

² As in *Potter v. Lee* (1892), 94 Mich. 140, 53 N. W. R. 1047, where the parties had agreed that the buyer should have ten days in which to determine whether the goods were acceptable or not; but he did nothing in that time, and was therefore held to have accepted (*Farrington v. Smith*, 77 Mich. 550, 43 N. W. R. 927; *Childs v. O'Donnell*, 84 Mich. 533, 47 N. W. R. 1108; *Lee v. Bangs*, 43 Minn. 23, 44 N. W. R. 671; *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. R. 718, were cited and relied upon);

§ 1383. — **Acceptance after test agreed upon — Failure to give notice stipulated for.**— It is very common, particularly in the case of contracts for the sale and warranty of machinery and agricultural implements, to provide expressly that the buyer, on receiving the article, shall at once proceed to test it in a time and manner agreed upon, and, in case it proves defective, shall notify the seller or his agent and give him an opportunity to remedy the defect. In case the defect cannot be remedied, the seller usually agrees either to substitute a perfect article or to take back the defective one and restore what has been paid upon the purchase price. Many of the older forms of contract contain no express provision as to the effect upon the warranty of a retention of the article without the test or notice agreed upon, but most of the later forms provide expressly that a failure to make the test, or the continued use of the article without notice of defects, shall be deemed conclusive evidence that the warranty is satisfied. Warranties of these kinds are frequently spoken of as conditional warranties.

§ 1384. —. Contracts of this sort are entirely lawful and, unless their provisions are waived, must be enforced as the parties made them.¹ The seller is bound to make the test in

and *Turner v. Machine Co.*, 97 Mich. 166, 56 N. W. R. 356, where the parties had agreed upon thirty days as the period in which the buyer should determine; and *Gentilji v. Starace*, 133 N. Y. 140, 30 N. E. R. 660, where there was a sale of wine "to be in good merchantable order," "to be approved by buyer within three days after delivery," and it was held that the duration of the warranty was limited to the three days specified. See also *Stevens v. Hertzler* (1896), 109 Ala. 423, 19 S. R. 838; *Moline, etc. Co. v. Pereau* (1897), 52 Neb. 577, 72 N. W. R. 956.

In *Warder, Bushnell, etc. Co. v.*

Horne (1900), — Iowa, —, 81 N. W. R. 591, a binder was sold with a warranty which required that the buyer should give it one day's trial, and if it did not work satisfactorily the seller should be entitled to send a person to put it in order, and that if it then proved unsatisfactory it should be returned at once. *Held*, that "at once" meant within a reasonable time. Also, that evidence that the buyer consumed parts of four afternoons in testing it warranted the jury in finding such test equal to one day's test.

¹ Courts in several cases have called especial attention to the fact that

good faith¹ in the manner provided for; he is bound to do it within the time agreed upon;² and if the test proves unsatisfactory he must give the notice at the time, in the manner and to the persons specified.³ If the contract provides for replacing the article, he must allow a reasonable opportunity for

these provisions cannot be disregarded, but must be enforced. See, *e. g.*, *Russell v. Murdock*, 79 Iowa, 101, 44 N. W. R. 237, 18 Am. St. R. 348; *Fahey v. Esterley Machine Co.*, 3 N. Dak. 220, 55 N. W. R. 580, 44 Am. St. R. 554; *McCormick Harvester Co. v. Brower*, 88 Iowa, 607, 55 N. W. R. 537.

In *Williams Mfg. Co. v. Standard Brass Co.* (1899), 173 Mass. 356, 53 N. E. R. 862, plaintiff contracted to furnish defendant with an equipment for melting brass, which was to be subjected to a sixty days' trial and to be paid for if satisfactory to defendant. *Held*, that the defendant could waive the completion of the sixty days' trial at any time that he was convinced in good faith that the apparatus was not satisfactory, since the test was for his benefit.

¹ The test must be a fair one. *Bonham Cotton Comp. Co. v. McKellar*, 86 Tex. 694, 26 S. W. R. 1056. But though the buyer is bound to give the machine a fair trial, he is not bound to make repeated trials. *McCormick Harvester Co. v. Russell*, 86 Iowa, 556, 53 N. W. R. 310.

In *Louisiana, etc. Co. v. Bass, etc. Works* (1895), 30 U. S. App. 433, 16 C. C. A. 130, 69 Fed. R. 65, the plaintiff sold machinery to the defendant company under certain terms, which included a payment of \$24,000, according to delays to be determined by a continuous test of four days, to be made within forty days. A test of only eight hours was made, and

that not within forty days. *Held*, that under the evidence the eight-hour test was as satisfactory as the four-day test; and that, since the delays already accorded the defendant were greater than could have been given it under any test, the plaintiff was entitled to the \$24,000.

² The buyer must perform the contract according to its terms. He must give the notice neither too soon nor too late. He must not undertake to give it until he has given the test of the kind and for the time specified. *McCormick Harvester Co. v. Brower* (1893), 88 Iowa, 607, 55 N. W. R. 537. In this case the warranty given with a machine required immediate notice of defects, after one day's trial, and the allowance of time for the vendor to put the machine in order. *Held*, that unless the day's trial revealed defects precluding the proper working of the machine, notice at the end of it was premature, and the refusal of time for the vendor to put the machine in working order deprived the vendee of his right to rescind.

³ Where the contract provides that the notice of defects shall be given both to the agent and to the manufacturer at his home office, notice to the agent only will not suffice. *Fahey v. Esterley Machine Co.*, 3 N. Dak. 220, 55 N. W. R. 580, 44 Am. St. R. 554 (*Furieux v. Esterley*, 36 Kan. 539, 13 Pac. R. 824, and *Nichols v. Knowles*, 31 Minn. 489, 18 N. W. R. 413, were cited; but compare with *Champion*

doing so.¹ A failure to make the test or to give the notice or permit the substitution as agreed, unless waived by the seller, will be deemed to be an acceptance of the goods, the sale becomes absolute, and the buyer's right of rejection is at an end.²

Machine Co. v. Mann, 42 Kan. 372, 22 Pac. R. 417.

In *Aultman-Taylor Mach. Co. v. Ridenour* (1896), 96 Iowa, 638, 65 N. W. R. 980, defendant purchased a machine from plaintiff with a warranty, the contract providing that notice of failure of warranty should be sent by registered letter. Defendant got the agent of the plaintiff to write a letter for him, signed it, and left it with the agent to be registered. *Held*, that the letter of defendant was sent within the provisions of the contract.

¹ *Pitts Mfg. Co. v. Spitznogle* (1880), 54 Iowa, 36, 6 N. W. R. 71; *Robinson v. Berkey* (1900), — Iowa, —, 82 N. W. R. 972.

² *Fahey v. Esterley Machine Co.*, 3 N. Dak. 220, 55 N. W. R. 580, 44 Am. St. R. 554; *Minnesota Thresher Co. v. Hanson*, 3 N. Dak. 81, 54 N. W. R. 311; *McCormick Harvester Co. v. Brower*, 88 Iowa, 607, 55 N. W. R. 537; *Russell v. Murdock*, 79 Iowa, 101, 44 N. W. R. 237, 18 Am. St. R. 348; *King v. Towseley*, 64 Iowa, 75, 19 N. W. R. 859; *Bayliss v. Hennessey*, 54 Iowa, 11, 6 N. W. R. 46; *Wendall v. Osborne*, 63 Iowa, 100, 18 N. W. R. 709; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. R. 621; *Palmer v. Banfield*, 86 Wis. 441, 56 N. W. R. 1090; *Bonham Cotton Comp. Co. v. McKellar*, 86 Tex. 694, 26 S. W. R. 1056; *Aultman v. McKenny* (Tex. Civ. App.), 26 S. W. R. 267; *Springfield Engine Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. R. 856; *Byrd v. Printing Press Co.*, 90 Ga. 542, 16 S. E. R. 267; *Champion Machine Co.*

v. Mann, 42 Kan. 372, 22 Pac. R. 417; *Phelps-Bigelow Co. v. Piercy*, 41 Kan. 763, 21 Pac. R. 793; *Staver v. Rogers*, 3 Wash. 603, 28 Pac. R. 906; *Butler v. Leighton*, 149 Pa. St. 351, 24 Atl. R. 308; *Dewey v. Erie*, 14 Pa. St. 211; *Hickman v. Shimp*, 109 Pa. St. 16; *Stutz v. Coal Co.*, 131 Pa. St. 267, 18 Atl. R. 875; *Central Trust Co. v. Arctic Mfg. Co.*, 77 Md. 202, 26 Atl. R. 493; *McCormick Harvester Co. v. Hartman*, 35 Neb. 629, 53 N. W. R. 566; *Worden v. Harvester Co.*, 11 Neb. 116, 7 N. W. R. 756; *Latham v. Baussman*, 39 Minn. 57, 38 N. W. R. 776; *Nichols v. Knowles*, 31 Minn. 489, 18 N. W. R. 413; *J. I. Case Thresher Co. v. Vennum*, 4 Dak. 92, 23 N. W. R. 563; *Turner v. Muskegon Machine Co.*, 97 Mich. 166, 56 N. W. R. 356; *Weston v. Card*, 96 Mich. 373, 56 N. W. R. 26; *Pullman Palace Car Co. v. Metropolitan Street Ry. Co.*, 157 U. S. 94, 39 L. ed. 632.

Where the contract is to test and, if unsatisfactory, return the article, the buyer who refuses or neglects to do either makes the sale absolute. *Waters Heater Co. v. Mansfield*, 48 Vt. 378.

Where the warranty with which a machine was sold provided for notice to the vendor in case of failure to work satisfactorily, and friendly assistance from the vendee in remedying the defects, a substantial compliance was held necessary to entitle the purchaser to rescind the contract and return the machine, and the refusal of the purchaser to allow the vendor to readjust the machine was

The effect of such acceptance upon the warranty will be considered in a later section.¹

§ 1385. — **Waiver of the notice.**—The time or manner of notice stipulated for may, indeed, be waived; and this may be done either expressly or impliedly, as where the seller or his agent requests the continuance of the test after the expiration of the time specified,² or where he acts without objection upon irregular or informal notice.³ Waiver will also be implied where the seller disavows any further responsibility or refuses to remedy or take back the article in any event.⁴

§ 1386. — **Waiver by agent.**—The power to waive the notice or return is ordinarily within the limit of the authority of the agent who made the sale;⁵ but this power may be excluded by express provision to that effect in the contract with the purchaser⁶ or by otherwise notifying him that the agent does not possess it.

a waiver of its defects. *Sandwich Mfg. Co. v. Feary* (1892), 34 Neb. 411, 51 N. W. R. 1026; *McCormick Harv. Co. v. Brower*, 88 Iowa, 607, 55 N. W. R. 537.

¹ See *post*, § 1390 *et seq.*

² *Snody v. Shier*, 88 Mich. 304, 50 N. W. R. 252; *Bannon v. Aultman*, 80 Wis. 307, 49 N. W. R. 967; *Sandwich Mfg. Co. v. Fearey*, 40 Neb. 226, 58 N. W. R. 713; *Osborne v. Baker*, 103 Mich. 247, 61 N. W. R. 509; *Osborne v. McQueen*, 67 Wis. 392, 29 N. W. R. 636.

³ Where agent has notice in fact and attempts to remedy defect, formal notice is not necessary. *Massachusetts Loan Co. v. Welch*, 47 Minn. 183, 49 N. W. R. 740; *Champion Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. R. 417; *Ohio Thresher Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. R. 716; *Dean v. Nichols* (1895), 95 Iowa, 89, 63 N. W. R. 582; *Peterson v. Walter A.*

Wood Co. (1896), 97 Iowa, 148, 66 N. W. R. 96. Notice in writing is waived where oral notice is acted upon. *Briggs v. Rumley Co.* (1895), 96 Iowa, 202, 64 N. W. R. 784.

⁴ *Champion Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. R. 417; *Wood Mow. & Reap. Machine Co. v. Calvert*, 89 Wis. 640, 62 N. W. R. 532.

⁵ *Mechem on Agency*, § 349; *Pitsinowsky v. Beardsley*, 37 Iowa, 9; *Warder v. Robertson*, 75 Iowa, 585, 39 N. W. R. 905.

⁶ *Mechem on Agency, supra*; *Furneaux v. Esterley*, 36 Kan. 539, 13 Pac. R. 824; *Nichols v. Knowles*, 31 Minn. 489, 18 N. W. R. 413; *Fahey v. Esterley Machine Co.*, 3 N. Dak. 220, 55 N. W. R. 580, 44 Am. St. R. 554.

Where the contract expressly provides that "no agent or expert has any authority to add to or abridge or change it in any manner," an agent employed to repair defective ma-

§ 1387. — Acts of ownership indicating acceptance.—

The buyer may also manifest an acceptance by dealing with the goods in a manner inconsistent with an intention to reject them. Selling them as his own,¹ giving a chattel mortgage upon them,² consuming³ or otherwise beneficially using⁴ them in the course

chines has no implied power to waive a provision for notice not only to the selling agent but also to the home office (*Fahey v. Esterley Machine Co.*, *supra*); though a general state agent through whose office all business was done might have such power. *Champion Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. R. 417. Under such a contract, the buyer having the right to return and having offered to return a defective machine, a new arrangement was made with the agent that the buyer should keep it and try it again the next season; it was held that this might be sustained as a substitution if not as a waiver, and that the buyer's right to reject continued. *Osborne v. Baker*, 103 Mich. 247, 61 N. W. R. 509; *Snody v. Shier*, 88 Mich. 304, 50 N. W. R. 252.

¹ *Chapman v. Morton*, 11 Mees. & Wels. 534; *Valley Iron Works v. Grand Rapids F. Mill*, 85 Wis. 274, 55 N. W. R. 693; *Delamater v. Chappell*, 48 Md. 244.

In *Rock Island Plow Co. v. Meredith* (1899), 107 Iowa, 498, 78 N. W. R. 233, the plaintiff contracted to sell a number of hay loaders to defendant. Before the time for their delivery defendant wrote plaintiff that the outlook for hay was very poor, and not to ship the order until advised to do so. But the order was sent, the defendant paid the freight, advertised the goods for sale, and sold part of them. Not till six months afterward did he make any objection. *Held*, that the exercise of these acts

of ownership sufficiently proved acceptance.

² *Leggett Tobacco Co. v. Collier*, 89 Iowa, 144, 56 N. W. R. 417; *Van Winkle v. Crowell*, 146 U. S. 42, 36 L. ed. 880, 13 Sup. Ct. R. 18; *Wyler v. Rothchild* (1898), 53 Neb. 566, 74 N. W. R. 41. But see *Osborne v. McQueen*, 67 Wis. 392, 29 N. W. R. 636.

³ *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. R. 28, 36 Am. St. R. 895, 21 L. R. A. 135; *Lamar Water Co. v. City of Lamar* (1897), 140 Mo. 145, 39 S. W. R. 768.

In *Dauphiny v. Red Poll Creamery Co.* (1899), 123 Cal. 548, 56 Pac. R. 451, respondent contracted to purchase one hundred and eighty cords of wood from appellant, to be delivered on the lands of the respondent, and measured and paid for by him after he had consumed certain other wood that he had on hand. The other wood had not been consumed and nothing had ever been done with the wood delivered by appellant except that five cords had been used, when it was attached as belonging to respondent and appellant claimed title. *Held*, that the bare fact of five cords having been used, perhaps by mistake as the evidence indicated, was not proof of acceptance.

⁴ *Hudson v. Roos* (1889), 76 Mich. 173, 42 N. W. R. 1099; *McCormick Mach. Co. v. Martin* (1891), 32 Neb. 723, 49 N. W. R. 700; *Detroit Heating Co. v. Stevens* (1898), 16 Utah, 177, 52 Pac. R. 379; *Woodward v. Emmons* (1898), 61 N. J. L. 231, 39 Atl. R. 703.

of his business, and the like,¹ have been held to be acts so far indicative of ownership, and only to be justified by it, as to be inconsistent with the position that the ownership was still in the seller by reason of non-acceptance.

In *Kingman v. Watson* (1897), 97 Wis. 596, 73 N. W. R. 438, defendant purchased from plaintiff a threshing machine, which was warranted to be of good material and well made. If it proved unsatisfactory it was to be returned and purchaser's notes would be returned to him. Defendant found the machine defective, but used it for two years without returning or offering to return it. *Held*, that such use was an acceptance.

In *Chambers v. Lancaster* (1899), 160 N. Y. 342, 54 N. E. R. 707, a purchaser of stone crushers "at once commenced to use the machinery, and continued to use it, to as great an extent as frequent breakdowns would permit, for a period of about five months." The purchaser then refused to pay on the ground that the stone crushers were comparatively worthless. *Held*, that such use was an acceptance, and the seller could recover the price.

In *Carleton v. Jenks* (1897), 47 U. S. App. 734, 26 C. C. A. 265, 80 Fed. R. 937, plaintiffs contracted with defendants for a boiler to be placed in their steamer. When the work was complete, the owner, captain and chief engineer inspected it and took the steamer away without any further requirements. Subsequently, in a heavy gale, the boiler slipped from its fastenings and caused great damage. *Held* that, after the inspection and taking of the steamer, the plaintiffs are precluded from afterward raising the question of performance of the contract.

In *Brown v. Ellis* (1898), 19 Ky. L.

2023, 45 S. W. R. 94, a vendor of horses represented that horses sold had a certain pedigree and promised to procure the certificates thereof for the purchaser. The latter kept and used the horses for more than a year, with no attempt to rescind for the vendor's failure to furnish the certificates. *Held*, that the representation was not a condition precedent to right of recovery on the purchase-money notes.

In *Dodsworth v. Hercules Iron Works* (1895), 31 U. S. App. 292, 13 C. A. 552, 66 Fed. R. 483, the plaintiff sold an ice machine to defendants (plaintiffs in error). The machine should have had, by the contract of sale, a pump attached. This it did not have. Defendants used the machine in the regular course of their business for two years, though they showed that they had declined to accept the machine and requested the vendor to remove the same, within three months after its delivery. *Held*, that the two years' use of the machine was a waiver of the omission of the pump.

¹ In *Fry-Sheckler Co. v. Iowa Brick Co.* (1898), 104 Iowa, 494, 73 N. W. R. 1051, plaintiff corporation agreed to put a brick dryer in the brickmaking plant of defendant, to be tested by the latter for thirty days and removed by the vendor if not satisfactory. The test proved the dryer unsatisfactory, but the defendant refused either to pay for it or allow its removal. *Held*, that this constituted an acceptance.

§ 1388. **Effect of acceptance.**—The goods having been accepted, the question arises, What is the effect of that acceptance upon the rights and obligations of the parties? If the contract were in all respects regularly and properly performed by the seller, the acceptance can amount only to putting the seal of the buyer's approval upon the seller's performance. But suppose that the contract has not in all respects been performed, but the buyer has accepted the goods,—what now is the effect, and, particularly, what is the effect as a waiver of the seller's default? This question may take a variety of forms, which may be separately dealt with.

§ 1389. — **As waiver of time.**—And, first, what is the effect of acceptance as a waiver of default as to the time of delivery. It has already been seen that acceptance may operate as a waiver of the right to rescind, countermand or disaffirm by reason of the delay, but does it operate to prevent a recovery of damages for the delay? Lord Blackburn said: "When the contract was to deliver goods at a certain day, and that date is passed, the vendee may accept the goods and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not, by accepting a late delivery, waive any claim he may have for damages arising from the delay."¹ Not all of the American cases lay down the rule in so unqualified a form, and much must depend upon the circumstances of each case.² In many instances the buyer is in such a predicament that he has practically no choice, and the true rule doubtless is that the acceptance does not constitute a waiver of damages for the delay, in the absence of circumstances showing that such was the intention.³

¹ Blackburn on Sale, p. 524.

² See *Belcher v. Sellards* (1897), 19 Ky. L. R. 1571, 43 S. W. R. 676; *Dignan v. Spurr* (1891), 3 Wash. 309, 28 Pac. R. 529; *Strain v. Manufacturing Co.* (1891), 80 Tex. 622, 16 S. W. R. 625; *Harber v. Moffat Cycle Co.* (1894), 151 Ill. 84, 37 N. E. R. 676. But in *Minneapolis Thresh. Mach. Co.*

v. Hutchins (1896), 65 Minn. 89, 67 N. W. R. 807, the acceptance is said to be a waiver unless qualified by a reservation of the right to claim damages (*Bock v. Healey*, 8 Daly, 156; *Baldwin v. Farnsworth*, 10 Me. 414, and *Baker v. Henderson*, 24 Wis. 509, were cited).

³ Thus in *Industrial Works v. Mitch-*

§ 1390. — **As waiver of quantity.**— Similar general considerations affect the question of quantity. The buyer is not bound to accept more or less than he agreed; but the mere fact that he has accepted a part, while it may estop him from rescinding, does not necessarily preclude him from recovering or recouping damages for the failure to deliver the residue. In order to so preclude him, unless himself in default,¹ it must appear that such was the evident intention of the parties.²

§ 1391. — **As waiver of quality — 1. Where there was no warranty.**— The question of the effect of the acceptance — assuming it to have been given — as a waiver of the right to insist upon the kind or quality agreed upon is one of great importance and of no little difficulty, and the authorities upon many phases of it are in conflict. Beginning, however, with the simplest form, it is unquestioned that where the contract was executory and was accompanied by no warranty, either express or implied, the effect of the acceptance, in the absence of fraud, is to

ell (1897), 114 Mich. 29, 72 N. W. R. 25, where the buyer of machinery found himself so situated that a rejection would entail great loss, the court said: "The acceptance of the machinery under the circumstances of this case was practically an acceptance under compulsion. As was said by the court in *Ramsey v. Tully*, 12 Ill. App. 471: 'To say that an acceptance, after the time for delivery had passed, under such circumstances, was voluntary in such sense as to evince an intention to waive their right to claim damages for the delay, would be a perversion of language. They did the best they could in the situation in which they found themselves placed.' See also *Haven v. Wakefield*, 39 Ill. 509; *Hansen v. Kirtley*, 11 Iowa, 565; *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. R. 36; *Ruff v. Rinaldo*, 55 N. Y. 664."

¹ See *Harber v. Cycle Co.*, *supra*.

² See *post*, §§ 1398-1401; *Avery v. Wilson* (1880), 81 N. Y. 341, 37 Am. R. 503. In *Kipp v. Meyer* (1875), 5 Hun (N. Y.), 111, it is said: "Although the vendee is bound by his acceptance of a portion of several articles contracted to be sold, after an opportunity to examine them has been had (*Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *McCormick v. Sarson*, 45 N. Y. 265), yet the vendor is not thereby excused for the non-fulfillment of his contract as to the residue of such articles. If the vendee refuse to receive the whole of the inferior articles or any part of them, the vendor is liable in damages for the non-fulfillment of his contract in full. He cannot relieve himself from the fulfillment of the contract on his part, by inducing the vendee to accept some part of the articles contracted to be delivered."

conclusively determine that the contract has been fully performed. It thenceforward stands upon the same footing as the present sale of a specific chattel without express warranty, and the rule is therefore, here as there, *caveat emptor*.¹ The

¹ Studer v. Bleistein, 115 N. Y. 316, 22 N. E. R. 243, 5 L. R. A. 702; Brown v. Foster, 108 N. Y. 387, 15 N. E. R. 608; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. R. 335; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. R. 428; Gurney v. Railroad Co., 58 N. Y. 358; Gaylord Mfg. Co. v. Allen, 53 N. Y. 515; Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; Schopp v. Taft (1898), 106 Iowa, 612, 76 N. W. R. 843; Day v. Mapes-Reeve Co. (1899), 174 Mass. 412; Maynard v. Render (1895), 95 Ga. 652, 23 S. E. R. 194; Underwood v. Caldwell (1897), 102 Ga. 16, 29 S. E. R. 164; Titley v. Enterprise Stone Co., 127 Ill. 457, 20 N. E. R. 71; Barker v. Turnbull, 51 Ill. App. 226; Thompson v. Libby, 35 Minn. 443, 29 N. W. R. 150; Roman v. Bressler, 32 Neb. 240, 49 N. W. R. 368; Smith v. Rail Mill Co., 50 Ark. 31, 6 S. W. R. 225; Parks v. O'Connor, 70 Tex. 377, 8 S. W. R. 104; Guernsey v. Lumber Co., 87 Cal. 249, 25 Pac. R. 414; Talbot Paving Co. v. Gorman (1894), 103 Mich. 403, 61 N. W. R. 655, 27 L. R. A. 96.

In Talbot Paving Co. v. Gorman, *supra*, defendant had agreed to furnish paving stones according to certain specifications. The plaintiff received and used them, though claiming that some of them did not conform to the specifications; of these, defendant recut some and plaintiff recut others. Plaintiff sued to recover for work done in recutting the stone, etc.; defendant set up the balance of the purchase price. Plaintiff's claim was disallowed by the lower court and defendant recovered.

This was affirmed by the supreme court, which held that there was no warranty of fitness (see *ante*, § 1343), and as to the effect of the acceptance it was said, per Hooker, J.: "The principal question in this case is whether the plaintiff, by receiving and using the stone, accepted them as a full compliance with the contract, or whether he had a right to take them, and recover his damages by way of recoupment or action growing out of their failure to equal the specifications. There are cases which hold that an acceptance of goods precludes such recovery, and there are others which hold the contrary. On principle, the distinguishing feature seems to be a warranty. If the sale is without a warranty, and affords an opportunity for ascertaining whether the goods conform to the description, the doctrine of *caveat emptor* applies, and an acceptance cuts off all rights of recovery. The vendee should decline to receive the goods, and sue for a breach of the contract. If, on the other hand, the sale is with a warranty, the vendee may lawfully receive the goods, and recover or recoup damages upon the warranty, which is held to be a collateral undertaking. It is believed that the principle is generally recognized. In addition to cases cited by counsel, see Pierson v. Crooks, 115 N. Y. 539," 22 N. E. R. 349, 12 Am. St. R. 831. See also Williams v. Robb (1895), 104 Mich. 242, 62 N. W. R. 352; *post*, § 1392, notes.

buyer cannot rescind, because by his acceptance he has assented to the transfer of that chattel to himself; he cannot rely upon a breach of warranty, because, *ex hypothesi*, no warranty of any sort attended the sale.

§ 1392. — 2. Where there was an implied warranty or condition.—Passing next to the case of the executory sale upon an implied warranty or condition, the debatable ground is entered upon and the authorities are found hopelessly in conflict. As has been seen,¹ many of the cases of so-called implied warranty are more properly to be deemed sales upon the condition — made as part of the contract rather than collateral to it — that the goods to be supplied shall be of the kind or quality described, ordered or agreed upon. When, therefore, the seller offers goods in performance of the contract, and in satisfaction of this condition, it becomes, according to some authorities,² not only the right but the duty of the buyer to

¹ See *ante*, § 1205 *et seq.*

² In *Lee v. Bangs*, 43 Minn. 23, 44 N. W. R. 671, it is said: "One purchasing by sample must, upon the goods being sent him, examine them, and, if they do not come up to the sample, must decline to receive them, and within a reasonable time notify the seller. If he receive them and is silent, he will be deemed to have acquiesced in the quality."

In *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. R. 718, it is said: "Where goods are sold and delivered upon condition as to kind and quality, it is the duty of the vendee to promptly examine them, and, if the conditions are not complied with, to notify the vendor within a reasonable time of his refusal to accept. If he unreasonably delays such notification, he must be held to have accepted, in fact. This is elementary law and needs no citation of authorities, but see *McCormick Harvesting Machine*

Co. v. Chesrown, 33 Minn. 32, 21 N. W. R. 846; *Lee v. Bangs*, *supra*." Other Minnesota cases are strongly to the effect that the implied warranty cannot avail against obvious defects. *Haase v. Nonnemacher*, 21 Minn. 486; *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. R. 196; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. R. 150.

In *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. R. 777, there was a contract for the sale of lumber of certain grades or descriptions set forth in the contract. The buyers received the lumber, but in an action for the price sought to recoup damages for breach of contract or warranty as to quality. "Certainly," said the court, "the defendants were not obliged to receive lumber as complying with the grades mentioned in the shipping bills when such lumber or any portion thereof fell below such grades, or failed to comply with the terms of the contract; but to relieve them-

examine the goods so offered, and, if they do not satisfy the contract, to reject them within a reasonable time. Failing to so reject them, he declares his satisfaction with the seller's performance so far as inspection can disclose, and he can, in the

selves from such obligations the law required them to notify the vendors, at the time of receiving each barge, or within a reasonable time thereafter, that the same was not accepted as complying with the terms of the contract or the shipping bill. As found by the referee and trial court, no such notice was ever given. It is well settled that where, as here, the purchaser of goods delivered on an executory contract, with full knowledge, or with full opportunity for examination and knowledge, of their defects, which are open and apparent upon mere inspection, takes them into his possession, and appropriates them to his own use, without notifying the vendor at the time of receiving them, or within a reasonable time thereafter, that they are not accepted as fulfilling the contract, he cannot recoup damages for such defects or failures in an action for the contract price. *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 626; *Olson v. Mayer*, 56 Wis. 551, 14 N. W. R. 640; *Gill v. Benjamin*, 64 Wis. 362, 25 N. W. R. 445. This disposes of the principal question in the case."

In *Jones v. McEwan*, 91 Ky. 373, 16 S. W. R. 81, 12 L. R. A. 399, the court held an acceptance, after inspection or fair opportunity to inspect it, of wheat furnished under a contract for wheat of a certain grade, precludes the buyer from recovering for an alleged breach of warranty. It was said: "The stipulation that goods of a certain description or quality are

to be delivered is made an essential part of the contract, which must be complied with by the vendor as a condition preceding the obligation of the vendee to receive the goods and pay for them; and if the goods tendered in discharge of the contract do not come up to the terms of it as to description or quality, the vendee has a right to reject them and hold the vendor responsible in damages; but if he, after having inspected them, or after having had a fair opportunity to do so, receives them in discharge of the contract, although they do not, as to description or quality, comply with its terms, he thereby waives these defects, and he cannot recover damages on account of them." *Dana v. Boyd*, 2 J. J. Marsh. (Ky.) 588; *O'Bannon v. Relf*, 7 Dana (Ky.), 320, and *Kerr v. Smith*, 5 B. Mon. (Ky.) 552, were cited and relied upon.

In *Studer v. Bleistein* (1889), 115 N. Y. 316, 22 N. E. R. 243, 5 L. R. A. 702, the court, per *Ruger, C. J.*, lays down the rule as follows: "An acceptance by the vendee of personal property manufactured under an executory contract of sale, after a full and fair opportunity of inspection, in the absence of fraud, estops him from thereafter raising any objection as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance is accompanied by some warranty of quality manifestly intended to survive acceptance. *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515;

absence of fraud, neither subsequently reject the goods nor rely upon any implied warranty in respect of any defects which were open to such observation. As to defects not so discover-

Gurney v. Atlantic & G. W. R. Co., 58 N. Y. 358; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. R. 428; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. R. 335; Brown v. Foster, 108 N. Y. 387, 15 N. E. R. 608." See also Dutchess Co. v. Harding, 49 N. Y. 321; Day v. Pool, 52 N. Y. 416, 11 Am. R. 719, where it is said: "The purchaser in an executory sale could not rely upon a warranty as to open, plainly apparent defects any more than he could in a sale *in presenti*." Brigg v. Hilton, 99 N. Y. 517, 3 N. E. R. 51, 52 Am. R. 63; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. R. 372, 16 Am. St. R. 753; McCormick v. Sarson (1871), 45 N. Y. 265.

In Pierson v. Crooks (1889), 115 N. Y. 539, 22 N. E. R. 349, 12 Am. St. R. 831, it is said: "There is no dispute as to the rule of law touching the rights of parties under an executory contract for the future sale and delivery of goods of a specified quality, in the absence of express warranty. The quality is a part of the description of the thing agreed to be sold, and the vendor is bound to furnish articles corresponding with the description. If he tenders articles of an inferior quality, the purchaser is not bound to accept them. But if he does accept them, he is, in the absence of fraud, deemed to have assented that they correspond with the description, and is concluded from subsequently questioning it. This imposes upon the vendee the duty of inspection before acceptance, if he desires to save his rights in case the goods are of inferior quality. There is in such case no warranty of

quality which survives acceptance, and the vendee cannot reject the goods after acceptance or recover damages for inferior quality. He can do nothing inconsistent with the right of rejection, or do what is only consistent with acceptance and ownership, without precluding himself. The mere use of an article on trial may in some cases be contemplated by the parties as a means by which the vendee is to ascertain whether it corresponds in quality with the article agreed to be furnished. [See Underwood v. Wolf, 131 Ill. 425, 23 N. E. R. 598, 19 Am. St. R. 40, quoted from in § 1393, *post*.—M.] In such cases mere use is not inconsistent with a subsisting right to reject for cause, and will not constitute an acceptance."

In Williams v. Robb (1895), 104 Mich. 242, 62 N. W. R. 352, there was a contract for the sale of a number of carloads of potatoes to be shipped in successive shipments and made under such circumstances that a warranty of merchantability at least would be implied. (See *ante*, § 1391.) Two carloads arrived which the buyer inspected, accepted and paid for. *Held*, that as to these the buyer could not recover damages for an alleged defective quality. The distinction between condition and warranty was pointed out, and Talbot Paving Co. v. Gorman (1894), 103 Mich. 403, 61 N. W. R. 655, 27 L. R. A. 96 (see notes to preceding section), was referred to.

In Comstock v. Sanger, 51 Mich. 497, 16 N. W. R. 872, there was a contract for the sale of lumber by de-

able, he may rely upon the warranty:¹ as to all others, the warranty does not survive acceptance.

§ 1393. —. Another line of authorities, however, denies that the buyer is under any such obligation to examine the goods and determine conclusively upon their correspondence with the contract. Acceptance unexplained may indeed be strong evidence of satisfaction, but it is not conclusive and may be rebutted by the circumstances. The seller's undertaking continues and follows the transfer of title to the buyer. The latter may, therefore, accept the goods even though inspection would disclose or he already knows that they do not correspond with the agreement, losing thereby his right to subsequently reject them, but not necessarily destroying his right to rely upon the implied warranty — the question whether, under all the circumstances, he intended to waive his rights being a matter for the jury.² What may have been, before acceptance, a condition,

scription. The buyers received without objection kinds and qualities other than those described. In an action for the price of the lumber delivered, the buyers sought to recoup for the deficiency, but the court said that "any difference between what they had a right to demand and what they actually received was waived by the reception without protest. This is a rule of justice as well as of law. *Parker v. Palmer*, 4 B. & Ald. 387; *Chapman v. Morton*, 11 M. & W. 534; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Barton v. Kane*, 17 Wis. 37, 18 Wis. 262; *Watkins v. Paine*, 57 Ga. 50. The contract in law had been complied with, and, though the performance was not exact, it had been accepted."

¹See cases cited in notes to § 1273. *ante*; *Miller v. Moore*, 83 Ga. 684, 10 S. E. R. 360, 20 Am. St. R. 329, 6 L. R. A. 374 [where Bleckley, C. J., says:

"Nor will inspection by the buyer before acceptance deprive him of the protection of the warranty as to latent defects. *Miller on Conditional Sales*, 87, 94; *Biddle on Warranty*, secs. 111, 141; *Meickley v. Parsons*, 66 Iowa, 63, 23 N. W. R. 265, 55 Am. R. 261; *Jones v. George*, 61 Tex. 345, 48 Am. R. 280; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. R. 455, 5 L. R. A. 213, 22 N. E. R. 47. Whether *Hight v. Bacon*, 126 Mass. 10, 30 Am. R. 639, and *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, are consistent with this rule we need not inquire, since we are quite certain that the rule prevails in Georgia, however it may be in some other States. *Atkins v. Cobb*, 56 Ga. 86].

²In *Northwestern Cordage Co. v. Rice* (1896), 5 N. Dak. 432, 67 N. W. R. 298, 57 Am. St. R. 563, it is said: "Cases may arise where it is apparent that the purchaser could not have relied on the warranty when

becomes afterwards, it is said, an implied warranty, which will avail the buyer after his right of repudiation is gone.¹

he accepted the goods, or that he has waived his right to insist upon such warranty. But we think it would be an extremely unjust rule to interpret as an implied waiver the conduct of the purchaser in receiving the goods which do not exactly correspond to the warranty, merely because he might, by examination, have discovered the defect. It often happens that the purchaser is so situated that it is necessary for him to accept the article in its defective condition. It would indeed be singular that one who had placed him in that position should be allowed to escape liability on his contract of warranty. In many cases the inference of a purpose to rely upon the warranty is stronger than the inference of a purpose to pay the price of a good article for a defective one. In the case at bar, the jury would have been justified in finding that defendant could not, without particular examination, have discovered that the twine was not pure Manilla. In favor of one who has warranted an article, the purchaser does not owe the duty of careful inspection. He may rely on the warranty. There is much confusion in the authorities. This is the consequence of too much refinement in reasoning, and the making of many nice distinctions. The law on this subject should be adjusted to the needs of the business world, and be made as simple as possible. Without attempting to anticipate the exceptions to the general rule which in the future it may be found necessary to establish, we believe it to be in the interests of justice, and to fairly ex-

press the sense of business men upon the subject, that whatever form a warranty assumes, if there is in fact a warranty, the mere acceptance of the property will not, as a matter of law, bar a recovery for breach of the warranty, although an inspection of the property would have led to a discovery of the breach. Nor will actual knowledge of the defective condition of the thing delivered necessarily preclude a reliance upon the warranty. All the facts are to be laid before the jury, to the end that they may determine whether the purchaser relied on the warranty, and whether he has waived his right to take advantage of its breach. *Gould v. Stein*, 149 Mass. 570; *English v. Spokane Commission Co.*, 48 Fed. R. 196; *Lewis v. Roundtree*, 78 N. C. 323; *Best v. Flint*, 58 Vt. 543, 56 Am. R. 570; *Polhemus v. Heiman*, 45 Cal. 573; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 26 Am. St. R. 890; *Hege v. Newsom*, 96 Ind. 426; *English v. Spokane Commission Co.*, 57 Fed. R. 451; 2 *Benjamin on Sales* (6th Am. ed.), 856, note 29; *Dayton v. Hooglund*, 39 Ohio St. 671; *Holloway v. Jacoby*, 120 Pa. St. 583, 6 Am. St. R. 737; *Parks v. Morris, etc. Tool Co.*, 54 N. Y. 586; *Zabriskie v. Central, etc. R. R. Co.*, 131 N. Y. 72; *Morse v. Moore*, 83 Me. 473, 23 Am. St. R. 783; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. R. 753."

¹ *Morse v. Moore* (1891), 83 Me. 473, 22 Atl. R. 362, 23 Am. St. R. 783, 13 L. R. A. 224, is a recent case declaring this view. There was here a sale of ice by description and specification which might easily have been held to be an express warranty, but the

The former view has much to commend it in reason and principle, but the latter seems to be supported by the weight of authority.

court said that it was "immaterial for present purposes whether it be regarded as an express warranty, or an express condition implying warranty," though they finally declared it to be express. The defect was open to observation and the buyer most vigorously protested, though he received and stored the ice, and subsequently sold it on the best terms he could obtain. The seller brought an action for the price, and the defense was breach of warranty. The jury found that the buyer had accepted the ice, and the court below held that, the contract being executory, the defense of breach of warranty could not be made after acceptance. The supreme court reversed the judgment, holding that whether the case was deemed to be on condition or warranty, the same right to rely upon the warranty attached to the executory as to the executed sale. Acceptance, the court said, was not necessarily a waiver; the circumstances must be inquired into, and whether in view of them the defects were waived was a question for the jury. "It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although even much inferior in quality to the description contained in the contract. Certainly, it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance."

Morse v. Union Stock Yards (1891), 21 Oreg. 289, 28 Pac. R. 2, 14 L. R. A. 157, resembles *Morse v. Moore*, *supra*, in its essential features, though the

court treated the description as importing an implied warranty or condition. The buyer discovered the alleged defect in the cattle when they were delivered; but he had paid for them in advance and needed them badly; he therefore protested against the quality, but kept the cattle and sued for breach of implied warranty, and was held entitled to recover. The question of the effect of the acceptance was but briefly considered, though it was held that keeping them after protest was not such acceptance as waived the benefits of the warranty.

Tacoma Coal Co. v. Bradley (1891), 2 Wash. 600, 27 Pac. R. 454, 26 Am. St. R. 890, also resembles *Morse v. Moore*, *supra*, in many respects. Here an order was given for fire-brick manufactured by the seller, who knew the purpose to which the buyer expected to put them. There was also correspondence upon which a claim of express warranty could be based so that the buyer's demand might be placed on either ground. There was some dispute whether the defects were discoverable by inspection; but the court said, "be that as it may, we are of the opinion that the appellant [the buyer] had a right to assume that the brick were of the quality ordered, and to act accordingly, and that appellant violated no duty it owed respondent in failing to search for imperfections before using them." "It is undoubtedly true," said the court, "that if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a rea-

§ 1394. — 3. Where there was an express warranty.—

It was at one time thought, as has been seen, that an express warranty could not exist in connection with an executory contract, but this view has long since been shown to be unsound,

sonable time after discovering defects, the right to rescind the sale was thereby waived. But the right to recover damages on account of defective quality was in no wise affected. Benjamin on Sales (Bennett's notes, 1888), sec. 901. It is also true that in such cases a failure to give notice or to offer to return the goods would have an important bearing upon the question of warranty, and would raise a strong presumption that the goods received were of satisfactory quality. *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Abbott's Trial Evidence*, 348. That the vendee may retain the goods without notice and plead breach of warranty, in an action by the vendor for the purchase price, is shown by numerous authorities. *Dayton v. Hooglund*, 39 Ohio St. 671; *Polhemus v. Heiman*, 45 Cal. 573; *Holloway v. Jacoby*, 120 Pa. St. 583, 15 Atl. R. 487, 6 Am. St. R. 737; Benjamin on Sales, sec. 903, p. 867, and cases cited; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. R. 159."

In *Graff v. Osborne* (1895), 56 Kan. 162, 42 Pac. R. 704, defendant bought binding twine from the plaintiff, relying on a letter from the latter, with the representation: "We deal in nothing but first-class twine." The twine was not equal to the representation. *Held*, that defendant could elect to rescind the contract and return the goods, or could keep the inferior goods delivered and recoup in damages.

The rule that the implied warranty survives acceptance is strongly enforced in Illinois. Thus in *Babcock v. Trice*; 18 Ill. 420, 68 Am. Dec. 560, which was a sale of corn with an implied warranty of merchantability, it was held that while an acceptance of the corn, with an opportunity for inspection at the time of delivery, without complaint, might raise a presumption that it was of the proper quality, the presumption was not conclusive and would not preclude the buyer from relying on the warranty. See also *Crabtree v. Kile*, 21 Ill. 180; *Strawn v. Cogswell*, 28 Ill. 457; *Mears v. Nichols*, 41 Ill. 207, 89 Am. Dec. 381; *Peck v. Brewer*, 48 Ill. 54; *Doane v. Dunham*, 65 Ill. 512, 79 Ill. 131; *Estep v. Fenton*, 66 Ill. 467; *Owens v. Sturges*, 67 Ill. 366; *Prairie Farmer Co. v. Taylor*, 69 Ill. 440, 18 Am. R. 621.

The late case of *Underwood v. Wolf* (1890), 131 Ill. 425, 23 N. E. R. 598, 19 Am. St. R. 40, was a case of *express* warranty, but the language of the court extends to implied warranties as well, the court saying that it was "unnecessary to discuss any nice distinctions between warranties on the one side, and conditions precedent or descriptions of the property on the other."

So also in Pennsylvania. *Borrekins v. Bevan* (1831), 3 Rawle, 23, 23 Am. Dec. 85; *Holloway v. Jacoby* (1888), 120 Pa. St. 583, 15 Atl. R. 487, 6 Am. St. R. 737.

English v. Spokane Commission Co. (1893), 15 U. S. App. 218, 6 C. C. A. 416, 57 Fed. R. 451, is also an important

and the contrary rule is now firmly established even in the courts of the State where it was first doubted.¹ Certain of the difficulties, therefore, which are referred to in the preceding section, cannot arise where the warranty was clearly an express one.

It has indeed been seen² that even an express warranty cannot, in the sale *in presenti*, prevail in the face of defects so clearly obvious that no skill is required for their discovery; but it is also abundantly established that where the buyer is in doubt or is unwilling to rely upon his own judgment, he may protect himself by an express warranty which shall cover the doubtful quality.³ But the reason for the rule denying relief in the case of the present sale applies much less strongly in the case of the executory contract, if it can be deemed to apply at all.

§ 1395. —. The express warranty, therefore, stands upon different ground in reference to acceptance from that occupied, according to many authorities, by the implied warranty or con-

case in this connection. There five carloads of potatoes had been shipped from Omaha, Nebraska, to Spokane Falls, Washington, under circumstances which the court held to raise a warranty of merchantability. The buyers refused to pay drafts drawn with bill of lading attached until they had an opportunity to inspect the potatoes, and the bill of lading was delivered to the buyers, who examined the potatoes and received them. In an action for the price, the buyers sought to recoup for defects in the potatoes apparent upon such examination. The sellers contended that the buyers' acceptance after examination precluded a reliance on the implied warranty. The United States court of appeals for the ninth circuit held that the warranty survived and the buyers could rely upon it. The court referred to the con-

trary view as maintained by some courts, but declared that the weight of authority as well as reason gave the buyer the option to reject the goods or receive them and rely upon the warranty, either by way of affirmative action or recoupment. *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Best v. Flint*, 58 Vt. 543, 5 Atl. R. 192, 56 Am. R. 570; *Polhemus v. Heiman*, 45 Cal. 573; *Hege v. Newsome*, 96 Ind. 426, 431; *Lewis v. Rountree*, 78 N. C. 323; and *English v. Spokane Comm. Co.*, 48 Fed. R. 196, were cited and relied upon.

¹ See cases, § 1391. See also *Day v. Pool*, 52 N. Y. 416, 11 Am. R. 719; *Felsenthal v. Hawks*, 50 Minn. 178, 52 N. W. R. 528; *Scott v. Raymond*, 31 Minn. 457, 18 N. W. R. 274.

² See *ante*, § 1272.

³ See *ante*, § 1273 *et seq.*

dition; and it is well settled where an express warranty accompanied the contract, that while, by accepting the goods, the buyer may lose his right to subsequently reject them, he does not thereby necessarily lose his right to rely upon the warranty. The express warranty survives acceptance, and, by the great weight of authority, gives the buyer a remedy notwithstanding the defects were visible or open to discovery at the time they were received. The buyer may reject them, but he is not compelled to do so; he may retain them and rely upon the warranty.¹

¹ *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E. R. 1006, [citing *Kent v. Friedman*, 101 N. Y. 616, 3 N. E. R. 905; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. R. 51, 52 Am. R. 63; *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358, and distinguishing *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. R. 335; *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. R. 243, 5 L. R. A. 702; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. R. 349, 12 Am. St. R. 831]; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. R. 372, 16 Am. St. R. 753; *Day v. Pool*, 52 N. Y. 416, 11 Am. R. 719; *Parks v. Tool Co.*, 54 N. Y. 586; *Dounce v. Dow*, 57 N. Y. 16; *Iroquois F. Co. v. Wilkins Mfg. Co.* (1899), 181 Ill. 532, 54 N. E. R. 987; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. R. 598, 19 Am. St. R. 40; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560 (see also other Illinois cases in preceding section); *Morse v. Moore*, 83 Me. 473, 22 Atl. R. 362, 23 Am. St. R. 783, 13 L. R. A. 224; *Laporte Implement Co. v. Brock* (1896), 99 Iowa, 485, 68 N. W. R. 810; *Jackson v. Mott*, 76 Iowa, 263, 41 N. W. R. 12; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. R. 454, 26 Am. St. R. 890; *Rubin v. Sturtevant* (1897), 51 U. S. App. 286, 26 C. C. A. 259, 80 Fed. R. 930; *English v. Spokane Commission Co.*, 15 U. S. App. 218, 48 Fed. R. 196, 57 Fed. R. 451, 6 C. C. A. 416; *Central Trust Co. v. Arctic Ice Mach. Co.*, 77 Md. 202, 26 Atl. R. 493; *Holloway v. Jacoby*, 120 Pa. St. 583, 15 Atl. R. 487, 6 Am. St. R. 737; *Cox v. Long*, 69 N. C. 7; *Lewis v. Rountree*, 78 N. C. 323; *Best v. Flint*, 58 Vt. 513, 5 Atl. R. 192; *Shupe v. Collender*, 56 Conn. 489, 15 Atl. R. 405; *Eagan Co. v. Johnson*, 82 Ala. 233, 2 S. R. 302; *Riddle v. Webb* (1895), 110 Ala. 599, 18 S. R. 323; *Dayton v. Hooglund*, 39 Ohio St. 671.

The distinction as drawn in New York—in respect of which many courts differ, as has been seen in the preceding section, upon the first point, but with which most courts agree as to the second branch—is stated thus in *Fairbank Canning Co. v. Metzger*, *supra*: “It is undoubtedly the rule that in cases of executory contracts for the sale and delivery of personal property, if the article furnished fails to conform to the agreement, the vendee’s right to recover damages does not survive an acceptance of the property, after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. *Reed v. Randall*, 29

The single exception to this rule is that of the conditional warranty referred to in the following section.

§ 1396. Effect of acceptance—Where contract provides that it shall be conclusive.—While thus, in general, acceptance and retention of the goods are not necessarily conclusive against

N. Y. 358, 86 Am. Dec. 305; Beck v. Sheldon, 48 N. Y. 365; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. R. 335. But when there is an express warranty, it is unimportant whether the sale be regarded as executory or *in præsenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory as in a present sale. Day v. Pool, 52 N. Y. 416, 11 Am. R. 719; Parks v. Morris Ax and Tool Co., 51 N. Y. 586, Dounce v. Dow, 57 N. Y. 16; Brigg v. Hilton, 99 N. Y. 517, 52 Am. R. 63, 3 N. E. R. 51. In such cases the right to recover damages for the breach of the warranty survives an acceptance, the vendee being under no obligation to return the goods."

And in *Zabriskie v. Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E. R. 1006, it is said: "Upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection," citing and distinguishing the cases first mentioned in this note.

In *Holloway v. Jacoby*, 120 Pa. St. 583, 15 Atl. R. 487, 6 Am. St. R. 737, the buyer had paid for the goods (corn) in advance; on receipt he found it defective; he kept it and sold it on the best terms he could, giving no notice to the seller until after the sale, and two months after

receipt. He then brought an action for damages on the warranty, and was held entitled to recover.

But the keeping and using of a warranted article has been held to be evidence that the claim of defects was unfounded. Thus, in *Hodge v. Tufts* (1896), 115 Ala. 366, 22 S. R. 422, plaintiff sold a soda fountain to defendant with a warranty. Defendant, in an action for the price, claimed that it was defective, though he kept the fountain and used it for three or more months after becoming aware of the alleged defects, and paid his notes given for the purchase-money until seven or eight months after the sale. *Held*, that his keeping and using the fountain was evidence that the claim of defects was unfounded, and the payment of the notes was a waiver of the right to rescind.

In *Minnesota Thresher Mfg. Co. v. Hanson* (1892), 3 N. Dak. 81, 54 N. W. R. 311, the court say: "The retention and use of the property, without notice [to the seller] of defects, under the great preponderance of the later—and, as we think, better—authorities, affects only the right to rescind. The buyer may still rely upon the breach of warranty to defeat a recovery, in whole or in part, in an action brought by the seller to recover the purchase price. Continued use of the property, with knowledge of defects, and without notice or complaint to the seller, may be more or less persuasive as evidence of

the buyer's right to rely upon the warranty, the parties may, by the express terms of their agreement, make it so conclusive. This is frequently the result in the case of the contracts already referred to for the sale of implements and machinery,¹ the case of the so-called conditional warranty; and the rule is well settled that, where the contract so provides,² a retention of the property without complaint or a failure to give the stipulated

waiver of defects, but cannot establish such waiver as matter of law. See, generally, *Kellogg v. Denslow*, 14 Conn. 411; *Aultman v. Thierer*, 84 Iowa, 272; *Muller v. Eno*, 14 N. Y. 597; *Kent v. Friedman*, 101 N. Y. 616, 3 N. E. R. 905; *Vincent v. Leland*, 100 Mass. 432; *Taylor v. Cole*, 111 Mass. 363; *Warder v. Fisher*, 48 Wis. 338, 4 N. W. R. 470; *Ferguson v. Hosier*, 58 Ind. 438; *Pennock v. Stygles*, 54 Vt. 226; *Smith v. Mayer*, 3 Colo. 207.

In Wisconsin, however, the distinction between patent and latent defects is adhered to. *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. R. 295; *Locke v. Williamson*, 40 Wis. 377; *Morehouse v. Comstock*, 42 Wis. 626; *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. R. 777. But see *Larson v. Aultman*, 86 Wis. 281, 56 N. W. R. 915; *Park v. Richardson*, 81 Wis. 399, 51 N. W. R. 572.

¹ See *ante*, § 822.

² The difference between the older and later forms of contract may be made clear by illustration. The contract in *Aultman v. Thierer*, 34 Iowa, 272, is fairly typical of the first form: "The Buckeye reaper and mower is warranted to cut, if properly managed, one acre per hour, or ten or twelve acres per day, either grain or grass, in a workmanlike manner, with one pair of horses. The purchaser is allowed to cut two acres of grass and also two acres of grain on trial, and, in case anything proves

defective, due notice must be given to us or our agent, and time allowed to send a person to put it in order. If it does not work after this, and the fault is in the machine, it will be taken back or that part of it which proves defective and will be replaced, or the money paid for it refunded." Many substantially similar forms are found in the older cases. See *Bomberger v. Griener*, 18 Iowa, 477.

The warranty in *Osborne v. Baker*, 103 Mich. 247, 61 N. W. R. 509, is fairly typical as to the point in question of the later forms: "The machine is hereby purchased and sold subject to the following warranty and agreement, and no one has any authority to add to or change in any manner: All our machines are warranted to be well built, of good material, and capable of cutting, if properly managed, from ten to fifteen acres per day. If, on starting a machine, it should in any way prove defective, and not work well, the purchaser shall give prompt notice to the agent of whom he purchased it, and allow time for a person to be sent to put it in order. If it cannot then be made to do good work, the defective part will be replaced, or the machine received back from the purchaser at the office of the agent from whom it was purchased, and the money or notes returned. Keeping the machine during harvest,

notice of defects to the seller will, unless waived,¹ be deemed conclusive evidence that the warranty is satisfied.²

§ 1397. Effect of acceptance when brought about by fraud, mistake or promise to remedy.—It needs no authority to establish that an acceptance brought about by the seller's fraud cannot estop the buyer;³ nor that an acceptance given by the purchaser under a mistake of fact may in many cases be open to relief.⁴ So it is clear that an acceptance given provisionally upon the seller's promise to rectify defects cannot deprive the buyer of his remedy if the seller's promise is not performed.⁵

§ 1398. Effect of acceptance or rejection in part.—Where the contract is entire, even though it be one for several lots or articles,⁶ the vendee is not obliged to accept a portion only;

whether kept in use or not, *shall be deemed conclusive evidence that the machine fills the warranty.*"

¹ As to which, see *ante*, §§ 1385, 1386.

² *Kingman v. Watson* (1897), 97 Wis. 596, 73 N. W. R. 438; *Beasley v. Huyett & Smith Mfg. Co.*, 92 Ga. 273, 18 S. E. R. 420; *Aultman v. McKinney* (Tex. Civ. App.), 26 S. W. R. 267.

In *Minn. Thresher Co. v. Lincoln* (1894), 4 N. Dak. 410, 61 N. W. R. 145, a thresher was sold with the usual warranty, to be given a fair trial for two days and any defective parts returned. Use beyond that time was to be conclusive evidence that the machine satisfied the warranty. The machine wasted grain, and the vendor was notified, but his mechanics failed to remedy the defect. Nevertheless the vendee continued to use the machine throughout the season. *Held*, that he waived any claim arising on a breach of the warranty.

³ See *Dutchess Co. v. Harding*, 49 N. Y. 321. In *Shipway v. Broadwood* (1899), 1 Q. B. 369, the defendant agreed to purchase a pair of horses if

they were passed upon as sound by a veterinary surgeon whom he employed to examine them. The plaintiff, who sold the horses, bribed the surgeon to certify them as sound. *Held*, that the plaintiff could not recover on the contract, which depended on the validity of the certificate.

⁴ See *ante*, §§ 265, 840.

⁵ *Osborne v. Carpenter*, 37 Minn. 331, 34 N. W. R. 163; *Fitzpatrick v. Osborne* (1892), 50 Minn. 261, 52 N. W. R. 861.

⁶ "The entirety of the contract is not destroyed by the circumstance that the subject of the sale is of such uniform character as to be readily divisible proportionally, by weight or measure, or is contained in packages of uniform quantity and value, even with the added circumstance that the consideration is named only by way of affixing the rate or price of the unit of such division. *Clark v. Baker*, 5 Metc. 452; *Morse v. Brackett*, 98 Mass. 205." *Mansfield v. Trigg*, 113 Mass. 350. "But a contract, made at the same time, of different articles,

he may insist upon having all or none. He has, however, usually no right to accept a part only and to reject the residue as not conforming to the contract. He must accept or reject *in toto*, and, if he sees fit to reject, he must put the seller *in statu quo*.¹ Where, however, the contract is severable, the rule is otherwise. In such a case he may accept or reject different parcels according to their conformity.²

Even if the contract would not ordinarily be deemed severable, the parties may by their conduct so treat it as to show that they regarded it as severable in fact.³ And where the delivery is to be in instalments, the fact that the buyer has accepted one instalment will not preclude him from refusing to accept a second instalment which in fact does not conform to the contract.⁴

at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such failure been anticipated." *Norris v. Harris* (1860), 15 Cal. 226.

¹ *Rubin v. Sturtevant* (1897), 51 U. S. App. 286, 26 C. C. A. 259, 80 Fed. R. 930; *Clark v. Baker* (1845), 5 Metc. (Mass.) 452, 11 Metc. 186, 45 Am. Dec. 199; *Morse v. Brackett* (1867), 98 Mass. 205; *Mansfield v. Trigg* (1873), 113 Mass. 350; *Cahen v. Platt* (1877), 69 N. Y. 348, 25 Am. R. 203; *Pierson v. Crooks* (1889), 115 N. Y. 539, 22 N. E. R. 349, 12 Am. St. R. 831. Usage, however, may justify it. *Clark v. Baker*, 11 Metc. 186, *supra*.

² *Potsdammer v. Kruse* (1894), 57 Minn. 193, 58 N. W. R. 983.

³ *Russell & Co. v. Lilienthal* (1899), 36 Oreg. 105, 58 Pac. R. 890. where the court say that the entirety of the

contract may "be broken by the concurrent act of both parties, and when the [seller] delivered and the [buyer] accepted and paid for a portion of the [goods] without anything being said about the remainder, the parties by their conduct gave an implied assent to the severance of the contract to that extent at least." To like effect: *Mansfield v. Trigg*, *supra*.

⁴ *Hubbard v. George* (1868), 49 Ill. 275; *Cahen v. Platt*, *supra*.

In *Russell & Co. v. Lilienthal*, *supra*, defendant contracted with plaintiff to purchase certain lots of hops, represented by samples, which were to be accepted by a certain date and delivered at once, with the exception of one lot which could not be delivered till later. All the lots but the one excepted were accepted and paid for, but when this last lot was inspected it was seen to be inferior to the sample and was rejected. *Held*, that defendant was not bound to accept any lot that did not conform to sample, and he was at liberty to reject the lot he did without offering to return those already received.

§ 1399. —. On the other hand, the fact that the first instalments which have been accepted did not comply with the contract will not justify the buyer in refusing to accept subsequent instalments which do conform to it. Thus, in a case cited in the preceding section,¹ where there was a contract for the delivery of glass in instalments, and the first which had been received did not correspond with the contract, and the buyers thereupon refused to receive any more under the contract, the court said: "The fact that the glass delivered and received upon the contract was inferior did not give them the right to repudiate the contract altogether. They could demand better glass, and when the plaintiff offered to deliver the balance, if it was inferior, they could refuse to accept it. But if plaintiff was ready and willing to deliver for the balance such glass as the contract called for, they were bound to receive it."

§ 1400. —. And so, still further, if the buyer has accepted part even under an entire contract, he must pay for that so accepted, notwithstanding the subsequent default of the seller, subject, however, unless he has waived it, to his right to recoup for the non-delivery of the residue.²

§ 1401. —. Moreover, if the contract is severable, the refusal of the buyer, though wrongful, to accept part of the goods will not justify the seller in regarding the entire contract as repudiated, or release him from his obligation to deliver or tender the residue of the articles in accordance with the contract.³

§ 1402. **Rejection — Method and effect.**— Where the goods are not such as the buyer is bound to accept, he is, of course,

¹ *Cahen v. Platt* (1877), 69 N. Y. 348, 25 Am. R. 203. So, where the buyer, without reserving the right to reject later deliveries, has accepted, paid for and retained certain instalments which did not comply with the contract, he cannot on that account refuse to receive later instalments which do conform. *Guerusey v. West Coast Lumber Co.* (1890), 87 Cal. 249, 25 Pac. R. 414.

² *Avery v. Wilson* (1880), 81 N. Y. 341, 37 Am. R. 503. But see *Nightingale v. Eiseman* (1890), 121 N. Y. 238.

³ *Herzog v. Purdy* (1897), 119 Cal. 99, 51 Pac. R. 27 [citing *Morgan v. McKee*, 77 Pa. St. 238; *Young, etc. Mfg. Co. v. Wakefield*, 121 Mass. 91].

justified in rejecting them. The law prescribes no particular method of rejection, and, in the absence of an agreement as to the method, any means which unequivocally indicates that the buyer refuses to accept the goods will suffice.¹ The parties may agree that in case of rejection the buyer shall return the goods to the seller, but in the absence of such an agreement the buyer is under no obligation to return them: notice to the seller that they are rejected is all that the law requires.²

§ 1403. —. The effect of an authorized rejection is to put the seller in default, and ordinarily to release the buyer from further obligation to accept. The parties by their agreement may and often do stipulate that, in case of the rejection of the goods first offered, the seller shall have the right to remedy the defects or substitute other goods in their place; but in the absence of such an agreement the law does not require the buyer to give the seller repeated opportunities for performance, or to accept a second tender after a first one has been rejected and after the time first agreed upon has expired.³

¹Notice of the buyer's refusal to accept is not invalid because it does not come from the hand or mouth of the buyer himself, but from a third person by the buyer's direction. *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533.

²*McCormick Harvester Co. v. Chessrown*, 33 Minn. 32, 21 N. W. R. 846; *Exhaust Ventilator Co. v. Chicago, etc. Ry. Co.*, 69 Wis. 454, 34 N. W. R. 509; *McCormick Harvester Co. v. Cochran*, 64 Mich. 636, 31 N. W. R. 561; *Gibson v. Vail*, 53 Vt. 476; *Starr v. Torrey*, 22 N. J. L. 190; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Doane v. Dunham*, 65 Ill. 512; *Hunt v.*

Wyman, 100 Mass. 198; *Gray v. Consolidated Ice Mach. Co.* (1897), 103 Ga. 115, 29 S. E. R. 604; *Lucy v. Monflet*, 5 H. & N. 229; *Grimoldby v. Wells*, L. R. 10 C. P. 391.

The statement in the letter of purchasers of patterns to the seller, "We fear we cannot use them at all. We must either be paid for the extra cost or will return the patterns. Please advise us what to do in the matter,"—is not an absolute refusal to accept. *Bascom v. Danville Stove Co.* (1897), 182 Pa. St. 427, 38 Atl. R. 510.

³See *McCormick Harvester Co. v. Russell*, 86 Iowa, 556, 53 N. W. R. 310.

CHAPTER VIII.

OF PAYMENT OF THE PRICE.

§ 1404. In general.

I. WHEN PAYMENT IS DUE.

- 1405, 1406. Considerations controlling.
- 1407. When no term of credit, payment and delivery presumptively contemporaneous.
- 1408. — Same rule applies to executory contracts.
- 1409. Where seller is to do something before payment.
- 1410. Where term of credit is agreed upon.
- 1411. Where credit procured by fraud.
- 1412-1414. Delivery of the goods not necessary.
- 1415. By contract payment may be due before title passes.
- 1416. Demand for payment not necessary.

II. PLACE OF PAYMENT.

- 1417. When no place of payment specified, debtor must seek creditor.

III. THE AMOUNT TO BE PAID.

- 1418. Amount is price agreed upon.
- 1419. Payment of part does not discharge the whole.
- 1420. — Exceptions.

IV. THE MEDIUM OF PAYMENT.

- 1421. Unless otherwise agreed, payment to be in lawful money.
- 1422. Money must be genuine.

§ 1423. Payment by bill or note — Buyer's note presumptively not payment.

- 1424. — Contrary rule in few States.
- 1425. — Note of third person.
- 1426. — Presumptions not conclusive.
- 1427. Action upon note or original consideration.
- 1428. — Extension of time.
- 1429. Acceptance of forged or invalid note.
- 1430. — Note of insolvent.
- 1431. Acceptance of note induced by fraud.
- 1432. Conflict of laws.
- 1433. Check or draft as payment.
- 1434. — Certification does not affect.
- 1435. — Burden of proof.
- 1436. — Dishonored or forged check.
- 1437. Payment in seller's own note or debt.
- 1438. — Set-off.
- 1439-1441. Payment in goods.
- 1442. — If goods not delivered payment due in cash.

V. TO WHOM PAYMENT TO BE MADE.

- 1443. To the seller or his agent.
- 1. *Implied Authority to Receive Payment.*
- 1444. General considerations.
- 1445. Authority to receive payment not implied from possession of bill.

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| <p>§ 1446. Agent having possession or other <i>indicia</i> of ownership may receive payment.</p> <p>1447. Agent to sell merely or to solicit orders, without possession of goods, not authorized to receive payment.</p> <p>1448. When traveling salesmen may receive payment.</p> <p>1449. — When payment to agent part of terms.</p> <p>1450. — Notice of want of authority.</p> <p>1451, 1452. How, when agency unknown.</p> <p>1453. When authority to receive payment implied from possession of securities.</p> <p>1454. Whether authority to receive payment implied from relation of parties—Husband and wife—Parent and child.</p> | <p>2. <i>Construction of the Authority.</i></p> <p>§ 1455. Can receive nothing but money.</p> <p>1456. No authority to release or compromise the debt.</p> <p>1457. May receive part payment.</p> <p>1458. But may not extend time.</p> <p>1459. Not authorized to receive before due.</p> <p>1460. No authority to take checks.</p> <p>1461. If authorized to take check or note, has no authority to indorse and collect it.</p> <p>1462. Authority to collect does not authorize sale.</p> <p>1463. No authority to deal with funds collected.</p> <p>1464. May give receipt or discharge.</p> <p>VI. BY WHOM PAYMENT TO BE MADE.</p> <p>1465. By purchaser or his agent.</p> <p>1466, 1467. By stranger.</p> |
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§ 1404. *In general.*—The last duty of the buyer in the line of performance, remaining to be considered, is that of payment for the goods. It is the duty of the buyer to pay the price agreed upon at the time, in the manner and at the place which the contract requires.

It is not deemed necessary to go at large into the question of payment in general, as that belongs more appropriately to other treatises, but so much of the general subject as is germane to the subject of sales of personal property requires consideration, and will be dealt with as follows:

- I. When payment is due.
- II. The place of payment.
- III. The amount to be paid.
- IV. The medium of payment.
- V. To whom payment to be made.
- VI. By whom payment to be made.

I.

WHEN PAYMENT IS DUE.

§ 1405. **Considerations controlling.**—It has been seen in earlier sections that the title to goods may be transferred in our law merely by force of the contract and intention of the parties. Where the goods are specific, an unconditional agreement for their sale and purchase presumptively operates a present transfer of the title, even though the goods are not presently delivered or paid for. Where conditions expressly or impliedly intervene, or the goods are not yet ascertained, the title, as has been seen, will still pass by operation of the contract when the condition has been performed or the goods have been appropriated.

§ 1406. —. On the transfer of the title, a corresponding *obligation* to pay the price must immediately arise. But though the title may have passed, the buyer may not be impliedly entitled to possession; and so, though an obligation to pay the price may have arisen, the performance of that obligation may not be *due* until some future time. Before the transfer of the title, moreover, by express stipulation an obligation to pay the price may arise.

Assuming that such an obligation may thus arise, it becomes important to determine when its performance is due; and to the consideration of that question this first subdivision will be devoted.

§ 1407. **When no term of credit, payment and delivery presumptively contemporaneous.**—As has been already seen,¹ where the contract is silent as to the time of payment and no term of credit is agreed upon, the law presumes that the sale is for cash and that payment and the delivery are to be immediate and concurrent acts. In the ordinary case of present sale, therefore, silent as to the time of payment or delivery, the seller is under obligation to make an immediate delivery

¹ See *ante*, § 538 *et seq.*

and the buyer is required immediately and concurrently to pay the price in cash. The buyer consequently cannot obtain the goods until he has paid or tendered the price, or the seller waives¹ his right to its present payment; neither can the seller recover the price unless he has delivered or was ready to deliver the goods.²

§ 1408. — Same rule applies to executory contracts.—

The same rule must also apply where the contract was executory, or where the seller was bound to do something to or with the goods to put them in a deliverable condition; whenever they are ready for delivery and no term of credit is agreed upon, payment and delivery, as in the case of the present sale, must be deemed to be concurrent acts.³

§ 1409. Where seller is to do something before payment.

The parties may of course agree that the seller shall do some

¹ As to waiver, see *post*, § 549.

² *Johnson-Brinkman Co. v. Central Bank*, 116 Mo. 558, 38 Am. St. R. 615, 22 S. W. R. 813; *Southwestern Freight Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Chapman v. Lathrop*, 6 Cow. (N. Y.) 110, 16 Am. Dec. 433; *Clark v. Dales*, 20 Wend. (N. Y.) 61; *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Cleveland v. Pearl*, 63 Vt. 127, 21 Atl. R. 261, 25 Am. St. R. 748; *Whitmarsh v. Walker*, 1 Metc. (Mass.) 313; *Palmer v. Hand*, 13 Johns. (N. Y.) 434; *La Mont v. La Fevre*, 96 Mich. 175, 55 N. W. R. 687; *Walter v. Reed*, 34 Neb. 544, 52 N. W. R. 682; *Hall v. Brown*, 82 Tex. 469, 17 S. W. R. 715; *Sanborn v. Shipherd*, 59 Minn. 144, 60 N. W. R. 1089; *Neal v. Boggan*, 97 Ala. 611, 11 S. R. 809; *Whitman Agricultural Ass'n v. National Ass'n*, 45 Mo. App. 90; *Wabash Elevator Co. v. First National Bank*, 23 Ohio St. 311; *Merrill Furniture Co. v. Hill* (1894), 87 Me. 17, 32 Atl. R. 712.

³ *Behrends v. Beyschlag* (1897), 50 Neb. 304, 69 N. W. R. 835; *Smack v. Cathedral* (1898), 31 N. Y. App. Div. 559.

Where the goods are to be delivered in instalments and paid for as delivered, it is not necessary that the vendee on any day shall have money in readiness to pay for all of the goods; if he is ready to pay for those then to be delivered, it is enough. *Behrends v. Beyschlag, supra*.

Where an executory contract of sale is evidenced by two contemporaneous writings, one signed by the seller declaring the "terms of sale cash," and the other signed by the buyer reciting, "I shall pay bills daily," these are to be construed together and to mean that bills are to be presented and paid each day for the goods delivered during that day. *Anglo-American Provision Co. v. Prentiss* (1895), 157 Ill. 506, 42 N. E. R. 157.

other act than merely to be in readiness to deliver, as to deliver a bill of lading, produce inspectors' certificates, insure the goods and supply the policy, and the like, and the performance of such additional act, unless waived, will be a condition precedent to the right to receive payment.

§ 1410. Where term of credit is agreed upon.—Where a term of credit has been agreed upon, payment is not due until that term of credit has expired.¹ An express agreement as to credit is not indispensable: it may be implied from the custom of the trade or the previous course of dealing of the parties.²

§ 1411. Where credit procured by fraud.—The fact that the goods were by fraud procured to be sold upon a term of credit will not, by the weight of authority, permit a recovery of the price before the expiration of the credit given: by suing for the price the seller affirms the contract, and he must affirm it as an entirety. The seller may, as has been seen, rescind the sale and recover his goods, or he may recover their value in an action for their conversion if they are not returned.³ He may also, where the buyer has disposed of the goods for money or its equivalent, waive the tort and recover in *assumpsit* the amount so recovered as money had and received for his benefit.⁴ But he may not recover the price on the express contract, because the term of credit has not expired; neither can he recover the price on an implied contract, for where there is an express contract the law will not imply another.⁵ The rule

¹ *Miller v. Godfrey*, 1 Colo. App. 177, 27 Pac. R. 1016; *Seattle Ry. Co. v. Brewing Co.*, 5 Wash. 462, 32 Pac. R. 102.

² Where no credit is expressly agreed upon, but it is usual, the usual credit may be relied upon. *Brooks v. Paper Co.*, 94 Tenn. 701, 31 S. W. R. 160.

³ See *ante*, § 907.

⁴ See *Jones v. Hoar* (1827), 5 Pick. (Mass.) 285; *Berkshire Glass Co. v. Wolcott* (1861), 2 Allen (Mass.), 227, 79 Am. Dec. 781; *Kellogg v. Turpie*

(1879), 93 Ill. 265, 34 Am. R. 163; *Fuller v. Duren* (1860), 36 Ala. 73, 76 Am. Dec. 318; *Fiquet v. Allison* (1864), 12 Mich. 328; *Watson v. Stever* (1872), 25 Mich. 386; *Woods v. Ayres* (1878), 39 Mich. 345; *Coe v. Wagar* (1879), 42 Mich. 49; *Nelson v. Kilbride* (1897), 113 Mich. 637, 71 N. W. R. 1089.

⁵ *Kellogg v. Turpie* (1879), 93 Ill. 265, 34 Am. R. 163; *Allen v. Ford* (1837), 19 Pick. (Mass.) 217; *Dellone v. Hull* (1877), 47 Md. 112; *England v. Adams* (1893), 157 Mass. 449, 32 N.

would be different, however, if the credit alone were the only part of the contract resting on the fraud and that could be severed from the other elements of the contract.¹

§ 1412. Delivery of the goods not necessary.—As has been already seen,² the seller, in the absence of an agreement to the contrary, is not bound to send or carry the goods to the buyer as a prerequisite to his right to receive the price. Readiness and willingness to deliver are all that he needs to prove in order to recover.³

§ 1413. —. Where the property in the goods has passed, as in the ordinary case of present sale, the buyer must pay the price, notwithstanding that the goods are destroyed while still in the seller's possession. The risk passes with the title, while the right to the price inures at once to the seller, who holds thenceforth merely as the bailee of the buyer.⁴

E. R. 665; Jones v. Brown, 167 Pa. St. 395, 31 Atl. R. 647; Bulkley v. Morgan (1878), 46 Conn. 393; Stewart v. Emerson (1872), 52 N. H. 301; Emerson v. Steel Co. (1894), 100 Mich. 127, 58 N. W. R. 659; Ferguson v. Carrington, 9 B. & C. 59; Strutt v. Smith, 1 C., M. & R. 311; Selway v. Fogg, 5 M. & W. 83; Read v. Hutchinson, 3 Camp. 351.

The New York cases permit the credit alone to be avoided. Thus, in Heilbronn v. Herzog (1900), 165 N. Y. 98, 58 N. E. R. 759, the court says: "There is a well-recognized distinction in such cases as these between a disaffirmance of the sale *with all its incidents*, and a mere rescission of the credit upon which the sale was made." Citing Wigand v. Sichel, 3 Keyes, 120; Crossman v. Universal Rubber Co., 127 N. Y. 34, 27 N. E. R. 400, 13 L. R. A. 91; Wilson v. Foree, 6 Johns. 110. See also McGoldrick v. Willits, 52 N. Y. 612; Roth v. Palmer, 27 Barb. 652; Muser v. Lissner, 67

How. Pr. 509; Kingman v. Hotaling, 25 Wend. 423; Masson v. Bovet, 1 Denio, 69, 43 Am. Dec. 651. The New York rule was applied in Jaffray v. Wolf (1896), 4 Okla. 303, 47 Pac. R. 496. Dietz v. Sutcliffe (1883), 80 Ky. 650, also adopts the same rule in effect.

¹ Kellogg v. Turpie, 2 Ill. App. 55; approved in 93 Ill. 265, 34 Am. R. 163.

² See *ante*, § 1189.

³ Middlesex Co. v. Osgood (1855), 4 Gray (Mass.), 447; Smith v. Gillett (1869), 50 Ill. 290; Phelps v. Hubbard (1879), 51 Vt. 489; Dakota Stock Co. v. Price (1887), 22 Neb. 96, 34 N. W. R. 97; Schneider v. Oregon Co. (1890), 20 Ore. 172, 25 Pac. R. 391. See also Wood v. Tassell (1844), 6 Q. B. 234, 51 Eng. Com. L. 234; Smith v. Chance (1819), 2 B. & Ald. 753.

⁴ Rugg v. Minett, 11 East, 210; Smith v. Nevitt (1830), Walk. (Miss.) 370, 12 Am. Dec. 571; Waldron v. Chase (1854), 37 Me. 414, 59 Am. Dec. 56; Newhall v. Langdon (1883), 39 Ohio St. 87, 48 Am. R. 426.

§ 1414. —. And even though the title has not passed, and the price is to be paid only upon delivery, still if the buyer has expressly assumed the risk of the delivery — as where the goods are to be sent by water and the buyer assumes the risks of navigation,— he must pay the price though the goods are lost or destroyed before delivery.¹

§ 1415. By contract payment may be due before title passes.— There is, moreover, no reason why the parties may not stipulate that payment shall be made even before the title passes. As is said in a recent case: “If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum.”²

§ 1416. Demand for payment not necessary.— Unless there is a stipulation to the contrary, the buyer is not entitled to demand for payment, but must pay as soon as payment is due, under penalty of being sued.³ The contract may, of course, provide for payment only after demand or notice, and in such cases the demand or notice, and a reasonable time and opportunity to comply with it, are essential to put the buyer in default.⁴

II.

PLACE OF PAYMENT.

§ 1417. When no place of payment specified, debtor must seek creditor.— The parties may by the contract determine the place at which payment shall be made, and such a stipulation must control unless its terms are waived.

¹ As in *Castle v. Playford* (1870), L. R. 5 Ex. 165, 7 Ex. 98.

² *White v. Solomon* (1895), 164 Mass. 516, 42 N. E. R. 104, 30 L. R. A. 537.

³ *Benjamin on Sale* (6th Am. ed.), § 707.

⁴ Thus in *Brighty v. Norton*, 3 B. & S. 305, the bill of sale provided for

payment in ten years or at such earlier day or time as the defendant should appoint by notice in writing sent by post, or delivered to the plaintiff or left at his house or last place of abode. It was held that a notice served at noon to make payment in half an hour was not a rea-

Where, however, no place is fixed, the debtor must seek the creditor if he be within the State and make payment to him in person;¹ but he is not bound to follow him beyond the confines of the State, and readiness to pay within the State will be sufficient.²

III.

THE AMOUNT TO BE PAID.

§ 1418. Amount is price agreed upon.—The amount to be paid is, of course, the price agreed upon, if any; and if not, then the reasonable or market value of the goods. What this price is, and how it is ascertained and determined, are matters which have already been considered in a previous chapter.³

§ 1419. Payment of part does not discharge the whole.—The price agreed upon must not only be the amount to be paid, but it must ordinarily be the whole price. For it is well settled that payment of part of a fixed and ascertained debt at the time and place agreed upon is not a discharge of the whole, even though the creditor expressly agreed to receive it as such. The agreement to release the residue is, in such a case, without consideration, and therefore without effect.⁴

sonable one. In *Toms v. Wilson*, 4 B. & S. 442, a provision for payment "immediately on demand" was held to entitle the payor to a reasonable opportunity to get the money. And in *Massey v. Sladen*, L. R. 4 Ex. 13, where notice was provided to be given at the debtor's place of business and he was to pay "instantly on demand, and without delay on any pretense whatever," the same ruling in effect was made.

¹ *Gale v. Corey* (1887), 112 Ind. 39; *King v. Finch* (1878), 60 Ind. 420; *Smith v. Smith* (1842), 2 Hill (N. Y.), 351, 25 Wend. 405; *Hoys v. Tuttle* (1847), 8 Ark. 124, 46 Am. Dec. 309; *Sanders v. Norton* (1827), 4 T. B. Mon.

(Ky.) 461; *McKinder v. Littlejohn* (1843), 4 Ired. (N. C.) L. 198.

² *Hale v. Patton*, 60 N. Y. 233, 19 Am. R. 168; *Smith v. Smith*, 25 Wend. (N. Y.) 405; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 331, 37 Am. Dec. 417; *Southworth v. Smith*, 7 Cush. (Mass.) 391; *Tasker v. Bartlett*, 5 Cush. 359; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Gill v. Bradlev*, 21 Minn. 15.

³ See *ante*, § 204, *et seq.*

⁴ *Bailey v. Day*, 26 Me. 88; *Lee v. Openheimer*, 32 Me. 253; *Harriman v. Harriman*, 12 Gray (Mass.), 341; *Warren v. Hodge*, 121 Mass. 106; *Lathrop v. Page*, 129 Mass. 19; *Potter v. Green*, 6 Allen (Mass.), 442; *Grinnell v. Spike*,

§ 1420. — **Exception.**— Payment of a part, however, at a different time,¹ or place,² or in a different medium,³ than that stipulated for, will suffice to sustain the agreement to discharge the residue; and, where the amount is unliquidated and uncertain, payment of any sum made and accepted as full payment will discharge the whole.⁴

IV.

THE MEDIUM OF PAYMENT.

§ 1421. **Unless otherwise agreed, payment to be in lawful money.**— Unless otherwise agreed upon, payment is presumed to be required in cash⁵ and in the lawful money of the country. Parties may stipulate for payment in goods or notes or any other lawful thing that pleases them. They may agree that payment shall be made in gold or silver or any other form of money, or in the currency of a particular time or place;⁶

128 Mass. 25; Goodwin v. Follett, 25 Vt. 386; Wheeler v. Wheeler, 11 Vt. 60; Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578; Warren v. Skinner, 20 Conn. 559; Obendorf v. Union Bank, 31 Md. 126, 1 Am. R. 31; McKenzie v. Culbreth, 66 N. C. 534; Bryan v. Brazil, 52 Iowa, 350, 3 N. W. R. 117; Lankton v. Stewart, 27 Minn. 346, 7 N. W. R. 360.

¹ Pearson v. Thomason, 15 Ala. 700, 50 Am. Dec. 159; Goodnow v. Smith, 18 Pick. (Mass.) 414, 29 Am. Dec. 600; Brooks v. White, 2 Metc. (Mass.) 283; Booth v. Smith, 3 Wend. (N. Y.) 66; Smith v. Brown, 3 Hawks (N. C.), 580.
² Jones v. Bullitt, 2 Litt. (Ky.) 49; Rising v. Patterson, 5 Whart. (Pa.) 316; McKenzie v. Culbreth, 66 N. C. 534.

³ Jones v. Bullitt, *supra*; Savage v. Everman, 7 Pa. St. 315; Strang v. Holmes, 7 Cow. (N. Y.) 224; Blinn v. Chester, 5 Day (Conn.), 359; Bull v. Bull, 43 Conn. 455; Brooks v. White,

2 Metc. (Mass.) 283, 37 Am. Dec. 95; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Friedberg v. Moffett (1895), 91 Hun (N. Y.), 17.

⁴ Donohue v. Woodbury, 6 Cush. (Mass.) 148, 52 Am. Dec. 777; McDaniels v. Lapham, 21 Vt. 222; Goodwin v. Follett, 25 Vt. 386; Warren v. Skinner, 20 Conn. 559; Bull v. Bull, 43 Conn. 455.

⁵ "Cash or its equivalent."— Where the contract calls for "cash or its equivalent," but the parties have not agreed as to what shall be deemed an equivalent, the seller is not bound to accept drafts on third persons in payment, and the fact that he did so on several occasions does not bind him to continue. Hassard v. Hardison (1895), 117 N. C. 60, 23 S. E. R. 96.

⁶ For an elaborate discussion of the validity and effect of contracts stipulating that payment shall be made in money of a particular sort, *e. g.*, in

but if they do not, the current money of the country is intended.¹

§ 1422. Money must be genuine.—It follows necessarily from the rules already stated that the money which is to constitute the medium of payment must be genuine money. Payment in spurious or debased coin, forged bills or other worthless matter, in the absence of fraud or negligence on the part of the payee, is therefore of no effect, and the original indebtedness remains undischarged.²

§ 1423. Payment by bill or note—Buyer's note presumptively not payment.—The parties may agree, either expressly or impliedly,³ that the buyer's negotiable bill or note shall be received in absolute payment for the goods, and where it is so received the paper must be relied upon, and recourse cannot be had to the original account.⁴ The mere fact, however, that the buyer gives his bill or note for the amount of the goods does not necessarily argue that it is received in absolute

gold or silver coin, see note to 29 L. R. A. 512 *et seq.* and 593 *et seq.*

¹ As to payment in Confederate money when that was current, see *Hendry v. Benlisa* (1896), 37 Fla. 609, 20 S. R. 800, 34 L. R. A. 283.

² *Markle v. Hatfield*, 2 Johns. (N. Y.) 455, 3 Am. Dec. 446; *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. R. 281; *First National Bank v. Buchanan*, 87 Tenn. 32, 9 S. W. R. 202, 1 L. R. A. 199, 10 Am. St. R. 617; *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37; *West Philadelphia National Bank v. Field*, 143 Pa. St. 473, 22 Atl. R. 829, 24 Am. St. R. 562; *Ritter v. Singmaster*, 73 Pa. St. 400; *Mount v. Scholes*, 120 Ill. 394, 11 N. E. R. 401; *Clift v. Moses*, 112 N. Y. 426, 20 N. E. R. 392.

³ It is sometimes said that the agreement to receive the bill or note in absolute payment must be *express*, but the true rule is believed to be, not

that the agreement must be *formal* and entered into in express terms, but that it must be affirmatively established—there must be an agreement with reference to that special subject, but the fact of such an agreement may be found from the circumstances of the case. *Macomber v. Macomber*, — R. I. —, 31 Atl. R. 753; *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. R. 397; *Hart v. Boller*, 15 Serg. & R. (Pa.) 162, 16 Am. Dec. 536; *Berry v. Griffin*, 10 Md. 27, 69 Am. Dec. 123; *Riverside Iron Works v. Hall*, 64 Mich. 165, 31 N. W. R. 152; *Patten v. Hood*, 40 Me. 457; *Burton v. Wells*, 30 Miss. 688.

⁴ *Hoopes v. Strasburger*, 37 Md. 390, 11 Am. R. 538; *Berry v. Griffin*, *supra*; *Glenn v. Smith*, 2 G. & J. (Md.) 493, 20 Am. Dec. 452.

payment. By the weight of authority, the bill or note of the buyer given for the goods, whether at the time of the sale or subsequently, is presumptively a conditional payment only, and the debt is not paid unless the bill or note be paid.¹ To make the instrument operate as an absolute payment, there must have been a special agreement to that effect.

§ 1424. — **Contrary rule in few States.**— In a few States, on the other hand, the rule is reversed, and the buyer's negotiable bill or note is presumptively an absolute payment, though it may have been shown to have been conditional only. This latter rule prevails in Indiana,² Louisiana,³ Maine,⁴ Massachusetts⁵ and Vermont.⁶

¹ See Randolph, Com. Paper (2d ed.), § 1509, where many cases are cited. See also Segrist v. Crabtree, 131 U. S. 287, 33 L. ed. 125, 9 Sup. Ct. R. 687; Reed v. Van Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; American Brick & Tile Co. v. Drinkhouse (1897), 59 N. J. L. 462, 36 Atl. R. 1034; Joslin v. Giese (1897), 59 N. J. L. 130, 36 Atl. R. 680; Steinhart v. Mills, 94 Cal. 362, 29 Pac. R. 717, 28 Am. St. R. 132; Pritchard v. Smith, 77 Ga. 463; Bank v. Gifford, 79 Iowa, 300, 44 N. W. R. 558; Bradley v. Harwi, 43 Kan. 314, 23 Pac. R. 566; Au Sable Boom Co. v. Sanborn, 36 Mich. 358; Breitung v. Lindauer, 37 Mich. 217; Brown v. Dunckel, 46 Mich. 29, 8 N. W. R. 537; Geib v. Reynolds, 35 Minn. 331, 28 N. W. R. 923; Washington Slate Co. v. Burdick, 60 Minn. 270, 62 N. W. R. 285; Estate of Davis, 5 Whart. (Pa.) 530, 34 Am. Dec. 574; Weymouth v.

Sanborn, 43 N. H. 171, 80 Am. Dec. 144; Nightingale v. Chafee, 11 R. I. 609, 23 Am. R. 531; Moses v. Trice, 21 Gratt. (Va.) 556, 8 Am. R. 609; Nash v. Meggett, 89 Wis. 486, 61 N. W. R. 283; Zook v. Odle, 3 Colo. App. 87; Wyman v. Rae, 11 G. & J. (Md.) 416, 37 Am. Dec. 70; Otto v. Halff (1896), 89 Tex. 384, 34 S. W. R. 910.

² Daniel, Neg. Inst. (4th ed.), § 1260; Randolph, Com. Paper (2d ed.), § 1509; Thompson v. Peck, 115 Ind. 512, 18 N. E. R. 16, 1 L. R. A. 201; Godfrey v. Crisler, 121 Ind. 203, 22 N. E. R. 999; Nixon v. Beard, 111 Ind. 137, 12 N. E. R. 131; Keck v. State, 12 Ind. App. 119, 39 N. E. R. 899; Olvey v. Jackson, 106 Ind. 286, 4 N. E. R. 149; Bradley v. Groenedyke, 153 Ind. 508, 55 N. E. R. 434.

³ Daniel, Neg. Inst., § 1260; Hunt v. Boyd, 2 La. 109.

⁴ Daniel, Neg. Inst., § 1260; Ran-

⁵ Daniel, Neg. Inst., § 1260; Randolph, Com. Paper, § 1517; Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Melledge v. Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59; Ely v. James, 123 Mass. 36; Dodge v. Emerson, 131 Mass. 467.

⁶ Daniel, Neg. Inst., § 1260; Randolph, Com. Paper, § 1517; Hutchins v. Olcott, 4 Vt. 549, 24 Am. Dec. 634; Dana v. Binney, 7 Vt. 493; Farr v. Stevens, 26 Vt. 299; Dickinson v. King, 28 Vt. 378.

§ 1425. — **Note of third person.**— In respect of the bill or note of a third person, distinctions are made based upon the time and the method of the transfer. If it be transferred for an antecedent debt, and is indorsed by the buyer, the latter is of course liable upon his indorsement; but if it be not indorsed, the prevailing rule is that the paper is presumptively to be regarded as conditional payment only, and not as an absolute one, unless there is evidence of an agreement to so regard it.¹ If the bill or note is transferred contemporaneously with the sale but without the buyer's indorsement, the prevailing rule regards it as presumptively absolute;² if it be indorsed by the

dolph, Com. Paper (2d ed.), § 1517; Varner v. Nobleborough, 2 Greenlf. 121, 11 Am. Dec. 48; Paine v. Dwinel, 53 Me. 52, 87 Am. Dec. 533; Ward v. Bourne, 56 Me. 161; Strang v. Hirst, 61 Me. 1; Bunker v. Barron, 79 Me. 62, 8 Atl. R. 253, 1 Am. St. R. 282. But, as is pointed out in Strang v. Hirst, *supra*, the tendency of the court is not to extend the rule but rather to restrict it so as to conform as nearly as possible with the rule elsewhere. A non-negotiable bill or note is not presumptively a payment. Edmond v. Caldwell, 15 Mo. 340.

¹Noel v. Murray, 13 N. Y. 167; Holmes v. Briggs, 131 Pa. St. 233, 18 Atl. R. 928, 17 Am. St. R. 804; Shepherd v. Busch, 154 Pa. St. 149, 26 Atl. R. 363, 35 Am. St. R. 815; Hunter v. Moul, 98 Pa. St. 13, 42 Am. R. 610; Caldwell v. Hall, 49 Ark. 508, 1 S. W. R. 62, 4 Am. St. R. 64; Taylor v. Conner, 41 Miss. 722, 97 Am. Dec. 419; Duggan v. Pacific Boom Co., 6 Wash. 593, 34 Pac. R. 157, 36 Am. St. R. 182; Berry v. Griffin, 10 Md. 27, 69 Am. Dec. 123; Glenn v. Smith, 2 G. & J. (Md.) 493, 20 Am. Dec. 452.

The same rule applies to an order. Estey v. Birnbaum (1896), 9 S. Dak. 174, 68 N. W. R. 290.

Contra: Smith v. Bettger, 68 Ind. 254, 34 Am. R. 256.

In *Riverside Iron Works v. Hall*, 64 Mich. 165, 31 N. W. R. 152, the plaintiff had sold goods to Hall for a corporation of which he was president and had shipped the goods to the corporation. On their arrival Hall gave his individual acceptance for the price, due in four months, which the plaintiff acknowledged as "in settlement of account." This acceptance was not paid at maturity, and plaintiff then unconditionally surrendered it and received in its stead the acceptance of the corporation, not indorsed by defendant. It was held there was *prima facie* evidence that the latter acceptance had been received as payment.

²See Daniel's Neg. Inst. (4th ed.), § 1264; Randolph, Com. Paper (2d ed.), § 1544. If the seller of goods, at the time of the sale, receives from the buyer the note of a third person, without the buyer's indorsement (such note not being forged and there being no fraud on the part of the purchaser), the note will be presumed to have been accepted in payment and satisfaction, unless the contrary is proved. *Whitbeck v. Van Ness*, 11

buyer, it is then presumptively conditional.¹ Some courts, however, treat it as presumptively absolute even in the latter case.²

§ 1426. — **Presumptions not conclusive.**— The presumption in any of these cases may be overthrown by evidence, though the burden of proof rests upon him who seeks to overthrow it.³ The sufficiency of the evidence is, of course, for the jury.⁴

§ 1427. **Action upon note or original consideration.**— Where the bill or note has not been received in absolute payment, the seller, upon default in payment of the paper, may, at his option, sue either upon the bill or note, or upon the original

Johns. (N. Y.) 409, 6 Am. Dec. 383; *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. R. 397.

Where, at the time of the acceptance of goods sold upon trial, the seller accepts the note of a third person, he presumptively receives it as payment. *Challoner v. Boyington* (1895), 91 Wis. 27, 64 N. W. R. 422, reaffirming same case in 83 Wis. 399, 53 N. W. R. 694. But it will not be held payment where such was not the intention of the parties. *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 34 Pac. R. 157, 36 Am. St. R. 182.

¹ Daniel, *Neg. Inst.* (4th ed.), § 1265; *Randolph, Com. Paper* (2d ed.), §§ 1545, 1547.

² See *Randolph, Com. Paper*, § 1545, and cases cited from Indiana, Louisiana, Massachusetts, Maine and Vermont, *supra*.

³ See Daniel and *Randolph, ubi supra*; *League v. Waring*, 85 Pa. St. 244.

In *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. R. 316, A wrote to B asking: "If I would purchase a small stock . . . say to the value of

about \$800, would you take a four months' note in settlement? The note I propose to give you is given by . . . and indorsed by the following individuals." The note was for \$945. B replied: "We will accept your offer; send in your order." A then wrote an order, inclosing the note, saying: "The balance over the amount you can remit to me as soon as the note is paid." A ordered in all goods to the amount of \$974.83. The note was protested for non-payment, and B sued A for the price of the goods. Defense, that note was taken by B in payment. *Held*, that burden was on A to prove this, and that the correspondence was not sufficient evidence.

⁴ See *Randolph, Com. Paper*, § 1516, citing many cases; *Shepherd v. Busch*, 154 Pa. St. 149, 26 Atl. R. 363, 35 Am. St. R. 815; *National Park Bank v. Levy*, 17 R. I. 746, 24 Atl. R. 777, 19 L. R. A. 475; *Craddock v. Dwight*, 85 Mich. 587, 48 N. W. R. 644; *Yerkes v. Norris*, 90 Mich. 234, 51 N. W. R. 366; *Bond v. McMahon*, 94 Mich. 557, 54 N. W. R. 281.

consideration; though if he pursues the latter course he must be prepared to surrender the bill or note upon the trial or account for its non-production.¹

§ 1428. — **Extension of time.**— If the taking of the bill or note is accompanied by an agreement for an extension of time until the maturity of the instrument, the seller cannot before that time sue for the price upon tendering back the instrument; but where there is no separate agreement for an extension, it is held that the mere acceptance of a bill or note for a demand due at once does not amount to an extension or prevent the seller from suing for the price before the maturity of the instrument if he is ready upon the trial to restore it,² though upon this point the English and many American cases maintain the contrary, holding that the acceptance of the paper implies an agreement to wait until its maturity.³

¹ Randolph, Com. Paper (2d ed.), § 1582. Production at the trial is sufficient; it need not previously have been tendered back. Hoopes v. Strasburger, 37 Md. 390, 11 Am. R. 538; Glenn v. Smith, 2 G. & J. (Md.) 493, 20 Am. Dec. 453; Wyman v. Rae, 11 G. & J. 416, 37 Am. Dec. 70; Jackson v. Brown (1897), 102 Ga. 87, 29 S. E. R. 149; Otto v. Halff (1896), 89 Tex. 384, 34 S. W. R. 910.

² Randolph, Com. Paper (2d ed.), §§ 1569, 1570. In Moore v. Fitz (1880), 59 N. H. 572, it was held that where the price of goods is payable on demand, the seller, by subsequently taking the buyer's time notes for the amount, does not extend the time of payment unless the notes are specially agreed to be received in payment (citing many cases in that State). Whether it was so received in payment is a question of fact. Wilson v. Hanson, 20 N. H. 375; Foster v. Hill, 36 N. H. 526. To same effect: Shaw v. Presbyterian Church (1861), 39 Pa. St. 226. Graham v. Negus (1890), 55 Hun (N. Y.), 440, 8 N. Y.

Supp. 679, follows Moore v. Fitz, *supra*, and distinguishes Claflin v. Taussig, 7 Hun, 223; Jagger Iron Co. v. Walker, 76 N. Y. 521; Fleischmann v. Stern, 90 N. Y. 110.

³ Thus, Randolph, Com. Paper (2d ed.), § 1569: "Where the creditor takes a bill or note payable at a future day, his right of action on the original debt will be suspended until the paper becomes due (Benj. Chalm. Dig., art. 251; 2 Daniel, Neg. Inst. 295; 1 Edw. Bills & N., § 283; 2 Pars. Notes & B. 155; Story, Bills, § 419; Hoppy v. Mosher, 48 N. Y. 313; Brewster v. Bours, 8 Cal. 502; Blunt v. Walker, 11 Wis. 334; Pitt v. Acosta, 18 Fla. 270). So, if he takes a renewal of the original bill or note (Kendrick v. Lomax, 2 Cr. & J. 405; In re London, etc. Bank, 34 Law J. Ch. 418). But his action is only suspended where the bill is negotiable and might, by its transfer, give right of action to another person (Webster v. Bainbridge, 13 Hun (N. Y.), 180)." In England, see Davis v. Reilly, [1898] 1 Q. B. 1.

§ 1429. Acceptance of forged or invalid note.— The acceptance of the bill or note of a third person necessarily presupposes, in the absence of any understanding to the contrary that the paper is a genuine and valid instrument. Hence, though accepted as payment, if the instrument was void for usury¹ or proves to be a forgery,² or the maker is shown to have been incompetent,³ the effect of the paper as payment is destroyed, and a recovery may be had upon the original consideration.

§ 1430. — Note of insolvent.— For like reasons, where the seller accepted in payment the note of a third person who had previously, but without the knowledge of either buyer or seller, become insolvent and suspended payment, it was held that there was no payment and that an action for the price could be maintained.⁴ “We do not intend to say,” remarked the court, “that the parties could not have agreed that this note should be received in payment whether the makers had

¹ Gerwig v. Sitterly (1874), 56 N. Y. 214, where the court says: “It is well settled that when a valid debt exists and a usurious security is taken for it, the avoidance of the usurious security revives the debt.” Citing Cook v. Barnes, 36 N. Y. 520; Winsted Bank v. Webb, 39 N. Y. 325, 330.

² First Nat. Bank v. Buchanan (1888), 87 Tenn. 32, 1 L. R. A. 199, and note; Second Nat. Bank v. Wentzel (1892), 151 Pa. St. 142, 24 Atl. R. 1087; Emerine v. O'Brien (1881), 36 Ohio St. 491; Albright v. Griffin (1881), 78 Ind. 182.

³ Randolph, Com. Paper, § 1526: Montgomery v. Forbes (1889), 148 Mass. 249, 19 N. E. R. 342 (where a supposed corporate maker had no legal existence); Little v. American, etc. Machine Co. (1879), 67 Ind. 67 (where a married woman's note had been taken for the debt of her husband. Said the court: “The taking of the note of a married woman, which

is utterly void, cannot operate, *prima facie*, as payment of a debt for which it was given”). To like effect: Godfrey v. Crisler (1889), 121 Ind. 203, 23 N. E. R. 999.

⁴ Randolph, Com. Paper, § 1532; Roberts v. Fisher (1870), 43 N. Y. 159, 3 Am. R. 680. But in Bicknall v. Waterman (1857), 5 R. L. 43 (followed in Burgess v. Chapin, 5 id. 225; Beckwith v. Farnum, 5 id. 230), where there was a contract of sale with payment to be made in the note of a third person, it was held to be no defense for not delivering the goods that before the contract the maker had failed though this was unknown to both parties. The court held that there was no implied warranty of solvency, distinguishing Roget v. Merritt, 2 Caines (N. Y.), 117, and citing Sutherland v. Pratt, 11 M. & W. 296; Hastie v. Couturier, 9 Exch. 102, 20 Eng. L. & Eq. 535. But compare Benedict v. Field (1858), 16 N. Y. 595.

failed or not, or even if they had failed. But that is not this case."

§ 1431. Acceptance of note induced by fraud.—So, where the acceptance of the bill or note as payment has been procured through the fraudulent representations or practices of the buyer, as where he represents a worthless note to be good, and the like, it is held that the seller may disaffirm the agreement to receive it as payment and may recover the price of the goods, restoring the note upon the trial.¹ The same result will ensue where the note received is, by mistake, not the one which the seller agreed to receive,² if he has done nothing to waive his right to insist upon the correct one.

§ 1432. Conflict of laws.—The question whether the giving and accepting of the bill or note operates as a payment and extinguishment of the debt is one which goes to the force and effect of the contract itself and is not a mere rule of evidence. It is to be determined, therefore, by the law of the place where the payment is made, and not by that of the place where the action is brought.³

§ 1433. Check or draft as payment.—The principles referred to in the preceding sections apply in general to the case

¹ *Susquehanna Fertilizer Co. v. White* (1886), 66 Md. 444, 7 Atl. R. 802; *Hoopes v. Strasburger*, 37 Md. 390, 11 Am. R. 538 [distinguishing *Masson v. Bovet*, 1 Den. (N. Y.) 69, 43 Am. Dec. 651; *Fisher v. Fredenhall*, 21 Barb. (N. Y.) 82, and *Clements v. Smith*, 9 Gill (Md.), 156]; *Case v. Seass*, 44 Mich. 195, 6 N. W. R. 227. See also *Riverside Iron Works v. Hall*, 64 Mich. 165, 31 N. W. R. 152.

² Thus in *Goodspeed v. South Bend Plow Co.*, 45 Mich. 237, 7 N. W. R. 810, the seller of goods to a firm agreed to take the firm note. After the goods had been sent the firm dissolved, and one of the former partners then exe-

cuted a note in the firm name for the goods, which the seller received knowing of the dissolution. The other partner repudiated the note, and the seller sued for the price. It was held that the receipt of the note did not estop the seller, as the other partner might have acquiesced in it, but that when he repudiated it, it then became a different note from that agreed to be received, and that therefore an action could be maintained upon the original account.

³ *Thomson-Houston Co. v. Palmer*, 52 Minn. 174, 53 N. W. R. 1137, 38 Am. St. R. 536; *Ward v. Howe*, 38 N. H. 35.

of checks and drafts. A check or draft is not money and does not of itself satisfy an obligation to pay cash. The parties may, however, agree to accept it as money, and where they do so the paper will be treated as such;¹ but in the absence of such an agreement the check or draft is deemed conditional payment only, and will not satisfy the obligation unless the money is in fact received upon it,² or unless the holder is guilty of laches causing loss to the drawer.³

¹ In *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. R. 397, plaintiff sold a quantity of hogs to defendant. On their delivery and the computation of the amount, defendant said he would have to go to the bank for the money and asked plaintiff which he preferred, the cash or a draft on New York. Plaintiff replied that he preferred the draft. The hogs were then delivered and defendant went to the bank. He returned with the draft payable to plaintiff's order, and the plaintiff accepted it without the defendant's indorsement. The draft was dishonored, and plaintiff, after tendering it back to defendant, sued for the price. *Held*, that the facts showed that the draft had been accepted as absolute payment. In *National Park Bank v. Levy*, 17 R. I. 746, 24 Atl. R. 777, 19 L. R. A. 475, the payee had indorsed the check away and it had become the absolute property of another, and this was held to be sufficient evidence that it had been accepted as payment. In *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. R. 1130, upon the delivery of the check, the debtor's note was delivered to him and a receipt given. It was held that this was evidence that the check was received in payment.

² *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 290; *Goodwin v. Mass. L. & Tr. Co.*, 152 Mass. 189, 25 N. E. R. 100; *Strong v. King*, 35 Ill. 1, 85 Am. Dec. 336; *Burrows v. State*, 137 Ind. 474, 37 N. E. R. 271, 45 Am. St. R. 210; *Fleig v. Sleet*, 43 Ohio St. 51, 54 Am. R. 800, 1 N. E. R. 24; *Good v. Singleton*, 39 Minn. 340, 40 N. W. R. 359; *National Bank of Commerce v. Chicago, etc. R. Co.*, 44 Minn. 224, 46 N. W. R. 342, 9 L. R. A. 263, 20 Am. St. R. 566; *Koonen v. District of Columbia*, 4 Mackey, 339, 54 Am. R. 278; *Comtoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. R. 28; *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. R. 717, 28 Am. St. R. 132; *Weaver v. Nixon*, 69 Ga. 699; *Hatcher v. Comer*, 75 Ga. 728; *Stewart Paper Co. v. Rau*, 92 Ga. 511, 17 S. E. R. 748; *Barton v. Hunter*, 59 Mo. App. 610; *Johnson-Brinkman Com. Co. v. Central Bank*, 116 Mo. 558, 22 S. W. R. 813, 33 Am. St. R. 615; *Henry v. Conley*, 48 Ark. 267, 3 S. W. R. 181; *Bibb v. Snodgrass*, 97 Ala. 459, 11 S. R. 880; *Kansas City R. Co. v. Coal Co.*, 97 Ala. 705, 12 S. R. 395; *Lowenstein v. Bresler*, 109 Ala. 326, 19 S. R. 860.

³ *Anderson v. Gill*, 79 Md. 312, 29 Atl. R. 527, 47 Am. St. R. 402; *Carroll v. Sweet*, 128 N. Y. 19, 27 N. E. R. 763, 13 L. R. A. 43.

§ 1434. — **Certification does not affect.**—The fact that the check has been certified before its delivery does not alter the presumption.¹

§ 1435. — **Burden of proof.**—The burden of showing an agreement to accept the check as payment rests upon him who alleges it,² and the sufficiency of the evidence to establish such an agreement is ordinarily a question for the jury.³

§ 1436. — **Dishonored or forged check.**—A check, moreover, is supposed to be drawn upon funds, and this presumption enters into any agreement to receive it as payment. Even if such an agreement were made, therefore, if the drawer had neither funds nor credit at the bank upon which it was drawn, the check is worthless, and its falsity relieves the creditor from his agreement whether the debtor acted in good faith or not.⁴ The same result ensues where the check was a forgery.⁵

§ 1437. **Payment in seller's own note or debt.**—Where the sale is to be for cash—and this, as has been seen, is the presumption where no other agreement is made,—delivery and payment, as has likewise been seen, are to be concurrent acts, and the buyer is not entitled to the goods unless he at the same time pays for them. If, in relying upon immediate payment, the seller delivers the goods to the buyer, he may recover them if the buyer does not forthwith pay.⁶ The buyer having thus received the goods cannot keep them and tender in payment

¹Larsen v. Breene, 12 Colo. 480, 21 Pac. R. 498; Born v. First Nat. Bank, 123 Ind. 78, 24 N. E. R. 173. 7 L. R. A. 442, 18 Am. St. R. 312; Cincinnati Oyster Co. v. National Bank, 51 Ohio St. 106, 36 N. E. R. 833, 46 Am. St. R. 560; Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Andrews v. German Nat. Bank, 9 Heisk. (Tenn.) 211, 24 Am. R. 300.

²Brown v. Scott, 51 Pa. St. 357; League v. Waring, 85 Pa. St. 244.

³Shepherd v. Busch, 154 Pa. St.

149, 26 Atl. R. 363, 35 Am. St. R. 815; National Park Bank v. Levy, 17 R. I. 746, 24 Atl. R. 777, 19 L. R. A. 475; Blair v. Wilson, 28 Gratt. (Va.) 165; Springfield v. Green, 7 Baxt. (Tenn.) 301.

⁴Fleig v. Sleet, 43 Ohio St. 51, 54 Am. R. 800; Weddigen v. Boston Elastic Co. (1868), 100 Mass. 422.

⁵Springer v. Hubbard, 82 Me. 299, 19 Atl. R. 439.

⁶See this general subject discussed,

ante, § 551 *et seq.*

something which the seller had not agreed to receive. The buyer, therefore, who has obtained the goods on the basis of a cash sale cannot tender payment in the seller's own note or other obligation, or satisfy the duty to pay by offering to give credit for the price on the seller's indebtedness to the buyer. If the buyer insists upon so doing and refuses payment in cash, the seller may recover his goods.¹

§ 1438. — **Set-off.**— Where, however, instead of treating the contract as rescinded and recovering the goods, the seller affirms the sale and sues for the price, he cannot then prevent the buyer from setting off any proper claim, even though it

¹ Thus, in *Wabash Elevator Co. v. First Nat. Bank* (1872), 23 Ohio St. 311, it was held that the seller, on a contract silent as to the medium of payment, could recover the goods when the buyer refused the cash, but offered to give credit on account. The court said that under the circumstances it was clearly a sale for cash, and applied the rule, already discussed *ante*, §§ 538-557, that "A delivery with the expectation of receiving immediate payment is not absolute, but conditional until payment is made, and, where there is no waiver of payment, no title vests in the purchaser till the price is paid" [citing *Adams v. O'Connor*, 100 Mass. 515; *Whitwell v. Vincent*, 4 Pick. 449; *Leven v. Smith*, 1 Denio, 571; *Conway v. Bush*, 4 Barb. 564; *Merrill v. Stanwood*, 52 Me. 65; *Keeler v. Field*, 1 Paige, 312; *Russell v. Minor*, 23 Wend. 659; *Hanson v. Meyer*, 6 East, 614; *Hays v. Currie*, 3 Sandf. Ch. 585; *Conger v. Railroad Co.*, 17 Wis. 477; *Powell v. Bradlee*, 9 Gill & J. 220; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Acker v. Campbell*, 23 Wend. 372; *Coggill v. Railroad Co.*, 3 Gray, 545]. So, in *Wilmarth v. Mountford* (1821), 4 Wash. (U. S. C. C.) 79, 30 Fed.

Cas., p. 70, it is held that, when goods have been purchased to be paid for on delivery, and, instead of payment in money, a promissory note which has been dishonored, given by the owner of the goods, is offered in payment, the property is not changed, even though the seller may have taken the goods to the place where they were to be delivered and there laid them down in anticipation of immediate payment in money. The same ruling, for like reasons, was made in *Allen v. Hartfield* (1875), 76 Ill. 358, where the buyer of horses told the seller to put them into the buyer's barn and then come to the house for his pay. The seller did so, but when he came to the house the buyer tendered him three notes purporting to be due from him, but which he claimed he did not owe. It was held no payment, and that the seller might recover his horses. A lawful tender cannot be made by offering the creditor's overdue promissory note, and insisting that it be set off against the debt. *Barker v. Walbridge* (1869), 14 Minn. 469, citing *Cary v. Bancroft*, 14 Pick. (Mass.) 315, and *Hallowell & Augusta Bank v. Howard*, 13 Mass. 235.

were expressly agreed that the sale was to be for ready money. Set-off is a statutory right of which the defendant may avail himself, notwithstanding a general agreement for a cash sale.¹

§ 1439. **Payment in goods.**—Contracts for the delivery of goods in payment are usually one of three kinds: 1. Contracts to pay a given sum in goods at a fixed rate. 2. Contracts to pay a given sum in goods, no rate being fixed. 3. Contracts to pay the given sum *or* to furnish designated goods.

§ 1440. —. As to the first of these classes some uncertainty exists whether the agreement is to be regarded as giving the payor the option to pay the money or deliver the goods, as he may elect, or as an absolute agreement to deliver such a quantity of goods as is represented by the rate fixed, regardless of its value at the time of payment. The question, obviously, becomes important where the value of the goods has changed in the interval. It is held in some cases that the contract is one for the delivery of the goods in any event. If then the goods are not delivered, the action must be for the breach of the contract and the measure of damages will be the value of the goods at the time of the breach.² Other cases, on the contrary, regard the contract as one giving the payor the option to deliver the goods or pay the money at the time agreed upon.³ The weight of authority seems to sustain this view.

§ 1441. —. With reference to the contracts of the second class it seems everywhere agreed that the payor has the option

¹ Eland v. Karr (1801), 1 East, 375; Cornforth v. Rivett (1814), 2 M. & Sel. 510.

² 3 Pars. on Cont. 215, citing Meason v. Philips, Addis. (Pa.) 346; Price v. Justrobe, Harper (S. C.), 111; Cole v. Ross, 9 B. Mon. (Ky.) 393, 50 Am. Dec. 517; Mattox v. Creig, 2 Bibb (Ky.), 584; McDonald v. Hodge, 5 Hayw. (Tenn.) 85; Edgar v. Boies, 11 Serg. & R. (Pa.) 445, per Gibson, C. J. Where a note is "payable in levee

bonds," this means that it *shall* be so paid and not simply that it *may* be; the payor, therefore, has no option. Johnson v. Dooley (1898), 65 Ark. 71, 44 S. W. R. 1032, 40 L. R. A. 74.

³ Pinney v. Gleason, 5 Wend. (N. Y.) 393, 21 Am. Dec. 223; Brooks v. Hubbard, 3 Conn. 58, 8 Am. Dec. 154; Perry v. Smith, 22 Vt. 301; Smith v. Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Heywood v. Heywood, 42 Me. 229, 66 Am. Dec. 277.

to discharge the debt in goods or money, as he may elect.¹ This option is, of course, expressly given in the contracts of the third class. The result, therefore, is that the payor has the option in the second and third classes, and, by the weight of authority, in the first also, to discharge the obligation in goods or money, as may seem most advantageous to him at the time payment is due.

§ 1442. — If goods not delivered, payment due in cash.

In none of the cases, however, does the option survive the time for performance, and all authorities agree that if the payor has an option, but does not on or before maturity deliver the goods, his option is lost, and the agreement then becomes an absolute one for the payment of the money and may be enforced accordingly.² This rule, of course, would not apply where the payor — as in some cases of the first class — has no option.³

V.

TO WHOM PAYMENT TO BE MADE.

§ 1443. To the seller or his agent.— Payment for the goods must, of course, be made either to the seller in person or to some agent authorized by him to receive payment. The full discussion of payment to an agent belongs properly to a treatise upon the law of agency, and has been dealt with by the present writer in another work. Some discussion of it here, particularly when the authority is implied rather than express, seems, however, to be appropriate, and will be given. Of an

¹Smith v. Coolidge (1896), 68 Vt. 516, 35 Atl. R. 432 [citing Wilkins v. Stevens, 8 Vt. 214; Perry v. Smith, *supra*; Kent v. Bowker, 38 Vt. 148].

²New York News Pub. Co. v. National Steamship Co. (1895), 148 N. Y. 39, 42 N. E. R. 514; Pinney v. Gleason, *supra*; Choice v. Moseley, 1 Bailey (S. C.), L. 136, 19 Am. Dec. 661; Perry v. Smith, *supra*; Read v. Sturdevant, 40 Vt. 521; Smith v. Coolidge, 68 Vt. 516, 35 Atl. R. 432; Deel v. Berry, 21 Tex. 463, 73 Am. Dec. 236; Dunman v. Strother, 1 Tex. 89, 46 Am. Dec. 97; Baker v. Todd, 6 Tex. 273, 55 Am. Dec. 775.

³Johnson v. Dooley, 65 Ark. 71, *supra*.

express authority to receive payment nothing more need here be said than that, if the authority exists and is properly exercised, the payment must be good.

1. *Implied Authority to Receive Payment.*

§ 1444. **General considerations.**—Repeating here to some extent what the writer has said in another treatise,¹ it may be noticed that whether an agent authorized to sell personal property has implied authority to receive payment is a question upon which there has been much difference of opinion. It will be obvious that its solution must depend largely upon the nature of the particular transaction and the usages if any in relation thereto.

If a merchant places behind his counters a clerk to sell goods, it could not be doubted that, in the absence of a known custom to pay a cashier or other person, the clerk would have implied power to receive, *at the time of the sale*, payment for the goods sold by him.² Whether he would have authority at some subsequent time to receive payment for the goods sold, after the account had gone upon the books, and the matter had passed into other hands, is evidently not so clear. If payment were made to him at his usual place in the store, the case would present a different aspect than if it had been made to him at his own home or upon the street. So, too, if he were one of many salesmen in a large establishment in the metropolis, a different case would be presented than if he were the only clerk in a country store, combining in himself salesman, bookkeeper, porter and collector.³

¹ See Mechem on Agency, § 336 *et seq.*

² See *Hirshfield v. Waldron*, 54 Mich. 649, 20 N. W. R. 628, where Champlin, J., says: "The usual employment of a clerk in a retail store is to sell goods to customers or purchasers, and it is implied from such employment that he has authority to receive pay for them on such sale.

But there is no implication from such employment that he has authority, after the goods are delivered and taken from the store, to present bills and collect money due to his employers, because it is not in the scope of the usual employment of such clerks."

³ See *Davis v. Waterman*, 10 Vt. 526, 33 Am. Dec. 216, where it is held that a clerk in a country store with

Again, if he were sent about the country with authority to sell goods intrusted to his possession for that purpose, authority to receive payment therefor would be implied, as it would not be presumed that the principal intended that they should be parted with without payment.¹ But if his authority was simply to solicit orders for goods, a sample of which he had in his possession, it being left for the principal to deliver the goods in pursuance of the orders taken, the question whether the agent might subsequently collect payment merely as an incident of the authority to take orders would present other considerations.²

§ 1445. Authority to receive payment not implied from possession of bill.—The mere fact that one claims to be authorized to receive payment is no evidence of his authority, nor can such authority be implied from the mere possession by the assumed agent of the bill or account, though made out upon the principal's bill-head and in his own handwriting.³

§ 1446. Agent having possession or other indicia of ownership may receive payment.—Where the principal intrusts the agent with the possession of the goods to be sold and authorizes him to sell and deliver them, authority to receive payment therefor will be implied, and a payment made to the agent at the time of the sale and delivery, or as part of the same transaction, will be binding upon the principal;⁴ of course,

whom are left the goods and demands of his employer has charge of both, and in the absence of his principal has power to receive pay on the demands and to institute suits for their security when an emergency arises.

¹ See second section following.

² See *post*, § 1447.

³ *Hirshfield v. Waldron*, 54 Mich. 649, 20 N. W. R. 628; *Dutcher v. Beckwith*, 45 Ill. 460, 92 Am. Dec. 232; *Kornemann v. Monaghan*, 24 Mich. 36; *Grover & Baker Sew. Machine Co. v. Polhemus*, 34 Mich. 247; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *McDonough v. Heyman*, 38 Mich. 334.

⁴ *Butler v. Dorman*, 68 Mo. 298, 30 Am. R. 795; *Sumner v. Saunders*, 51 Mo. 89; *Rice v. Groffmann*, 56 Mo. 434; *Higgins v. Moore*, 34 N. Y. 417; *Seiple v. Irwin*, 30 Pa. St. 513; *Capel v. Thornton*, 3 Car. & P. 352; *Pickering v. Busk*, 15 East, 38; *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Brooks v. Jameson*, 55 Mo. 505; *Lumley v. Corbett*, 18 Cal.

in the absence of any knowledge on the part of the purchaser that the agent was not authorized to receive payment.

Having put the agent into such a position that he may appear to the world as the owner of the property, or having held him out as authorized generally to sell, it would be a fraud upon those who had paid the agent in good faith, for the principal to be permitted to assert that he was not authorized to receive payment.

§ 1447. Agent to sell merely or to solicit orders, without possession of goods, not authorized to receive payment.—

Where, however, he is not intrusted with possession, the negotiation of the sale of goods by an agent, or the fact that he is, or acts as, agent to solicit orders for goods, will not, in the absence of a controlling usage to the contrary, authorize him to receive payment therefor.¹

§ 1448. When traveling salesmen may receive payment.—

The practice of selling goods through the agency of traveling salesmen who go from place to place exhibiting samples and soliciting orders has become so universal that the question of the authority of such an agent to subsequently receive payment for the goods has become very important and has been much discussed, but the decisions have not been entirely uniform. The preponderance of the authority, however, is undoubtedly in harmony with the principles stated in the preceding section,

494. See also *Howe Machine Co. v. 100; Graham v. Duckwall*, 8 Bush Ballweg, 89 Ill. 318. (Ky.), 12; *Abrahams v. Weiller*, 87 Ill.

¹*Janney v. Boyd*, 30 Minn. 319; 179; *Kohn v. Washer*, 64 Tex. 131, 53 *Brown v. Lally* (1900), — Minn. —, Am. R. 745; *Greenhood v. Keator*, 9 81 N. W. R. 538; *Butler v. Dorman*, Ill. App. 183; *Kornemann v. Monaghan*, 24 Mich. 36; *Bernshouse v. Abbott*, 16 Vroom (N. J.), 531, 46 Am. R. 68 Mo. 298, 30 Am. R. 795; *Chambers v. Short*, 79 Mo. 204; *Clark v. Smith*, 789; *Adams v. Fraser*, 82 Fed. R. 211, 88 Ill. 298; *McKindly v. Dunham*, 55 27 C. C. A. 108, 49 U. S. App. 481; Wis. 515, 13 N. W. R. 485, 42 Am. R. 740; *Simon v. Johnson* (1894), 105 Ala. 344, 740; *Seiple v. Irwin*, 30 Pa. St. 513; 16 S. R. 884; *Lakeside Press Co. v. Campbell* (1897), 39 Fla. 523, 22 S. R. Law v. Stokes, 3 Vroom (N. J. L.), 249, 878; *Clark v. Murphy* (1895), 164 Mass. 90 Am. Dec. 655; *Higgins v. Moore*, 490, 41 N. E. R. 674. 34 N. Y. 417; *Wright v. Cabot*, 89 N. Y. 570; *Crosby v. Hill*, 39 Ohio St.

that mere authority to solicit orders for goods, or subscriptions for books and other articles sold by subscription, the orders or subscriptions to be filled by the principal, implies no authority in the agent to subsequently receive payment, and payment made to such an agent will not be payment to the principal, unless the agent be in fact authorized,¹ or unless the principal has held him out as so authorized, or such payment is in accordance with the usage in similar cases.² If, however, payment in whole or in part is to be made at the time the order or subscription is taken, authority to receive such payment will be implied.³

§ 1449. — When payment to agent part of terms of sale.— But it has been held that an agent authorized to take the order has the implied power to make terms of payment as to time and place, to the extent at least of what was customary and not extraordinary; and that where it is made one of the terms of sale that payment may be made to the agent at the purchaser's place of business, to save the expense and trouble of remittance, payment to the agent was payment to the principal.⁴

So where a traveling salesman agreed, though without authority, to receive certain goods in part payment for those sold by him, the purchaser being ignorant of his want of authority, it was held that the agreement was binding upon the principal

¹ Kornemann v. Monaghan, 24 Mich. 36; McKindly v. Dunham, 55 Wis. 515, 13 N. W. R. 485, 42 Am. R. 740; Seiple v. Irwin, 30 Pa. St. 513; Clark v. Smith, 88 Ill. 298; Lakeside Press Co. v. Campbell, 39 Fla. 523, 22 S. R. 878; Brown v. Lally, — Minn. —, 81 N. W. R. 538; Clark v. Murphy, 164 Mass. 490, 41 N. E. R. 674; Simon v. Johnson, 105 Ala. 344, 13 S. R. 491, 16 S. R. 884; Crawford v. Whittaker, 42 W. Va. 430, 26 S. E. R. 516; Stuart v. Burcham, 50 Neb. 823, 70 N. W. R. 383; Chambers v. Short, 79 Mo. 204; Greenhood v. Keator, 9 Ill. App. 183;

Law v. Stokes, 32 N. J. L. 249, 90 Am. Dec. 655; Butler v. Dorman, 68 Mo. 298, 30 Am. R. 795. *Contra*, Hoskins v. Johnson, 5 Sneed (Tenn.), 469; Collins v. Newton, 7 Baxt. (Tenn.) 269.

² Meyer v. Stone, 46 Ark. 210, 55 Am. R. 577.

³ See *ante*, § 1444.

⁴ Putnam v. French, 53 Vt. 402, 38 Am. R. 682; Trainer v. Morison, 78 Me. 160, 3 Atl. R. 185, 57 Am. R. 790; Hoskins v. Johnson, 5 Sneed (Tenn.), 469.

who had shipped the goods to the purchaser.¹ Such an agent could not, however, bind his principal by agreeing that the price should be set off against a debt due from the agent to the purchaser.²

§ 1450. — Notice of want of authority.—It is frequently attempted to give notice to the purchaser that the agent is not authorized to receive payment by printing or writing upon the bill or invoice a warning to that effect. Actual notice of such limitation is, of course, binding upon the purchaser,³ but whether such a warning can be held to be constructive notice seems to depend upon its being given such a degree of prominence that the buyer can fairly be held to have notice of it.⁴

¹ *Billings v. Mason*, 80 Me. 496, 15 Atl. R. 59, *Mechem's Cases on Agency*, 406 (distinguishing *Clough v. Whitcomb*, 105 Mass. 482, and *Finch v. Mansfield*, 97 Mass. 89, and likening the case to *Wilson v. Stratton*, 47 Me. 120).

² *Talboys v. Boston*, 46 Minn. 144, 48 N. W. R. 688.

³ Payment to an agent after actual notice not to pay will not be good. *Stenwood v. Trefethen*, 84 Me. 295, 24 Atl. R. 855; or after actual notice that the agent's authority has been revoked: *Lewis v. Metcalf*, 53 Kan. 217, 36 Pac. R. 346; *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. St. 427, 26 Atl. R. 251. See also *Lamb v. Hirschberg*, 1 N. Y. App. Div. 519.

⁴ Thus in *McKinley v. Dunham*, 55 Wis. 515, 42 Am. R. 740, 13 N. W. R. 485, it is said by Orton, J.: "On the face of the bill sent to the defendant, and directly under his address, there appears in large, legible print in red ink, as if stamped upon it, the words 'Agents not authorized to collect.' . . . If these words so legible and prominent on the face of the bill would not be notice, it would seem

to be impossible to give a purchaser such a notice. By all authorities he must be presumed to have observed these words, and to have had notice when they were so prominent on the face of the bill of goods in his possession, and in which he alone was interested as purchaser. It might as well be said that the contents of any written or printed notice of any kind, or for any purpose, were not presumed to have been brought home to, and to be known by, a party on his receipt of the notice." And in *Putnam v. French*, 53 Vt. 402, 38 Am. R. 682, the court say: "It is further insisted by the plaintiffs' counsel that the defendants were charged with notice that they must pay the plaintiffs and not Allen (the agent) by reason of the words 'payable at office' written on their bill rendered, when the last invoice was sent. The defendants did not see those words. Therefore they had no notice in fact. Should they be held chargeable with notice? The plaintiffs sent that bill without any letter, when the goods were sent, which was three months before the time of payment agreed

§ 1451. — **How when agency unknown.**—Interesting questions arise in these cases where the agent at the time acted as the ostensible principal, and the fact of the agency or the name of the real principal was undisclosed. May the agent here receive payment, and what will be the effect upon the actual principal if he does? The answer to these questions depends largely upon whether the agent has been intrusted with the possession of the goods, or otherwise clothed with the *indicia* of ownership thereof. If he has, and if before the purchaser

upon. The defendants examined it as to items charged and amount of same, and filed it away,—never noticing those words; and when Allen came around at about the time he was to come for the pay by the terms of the sale, they paid him the balance due,—supposing all the while that he was, as he claimed to be, a member of the firm. In view of the obscure manner in which those words were written on the bill-head; and of the circumstances under which, and the purposes for which in other respects, that bill was sent, and of the terms of the contract as to whom and when and where payment was to be made, we do not think the defendants were guilty of such negligence, in not seeing those words, as to be chargeable with notice which they did not in fact have. It was a matter which the plaintiffs might easily have made plain. They saw fit to undertake to give the notice in an obscure way which was likely to be ineffectual. It turned out so and they should bear the consequences.” And in *Trainer v. Morison*, 78 Me. 160, 57 Am. R. 790, 3 Atl. R. 185, it appeared that goods ordered of an agent were delivered as agreed, accompanied by a bill with the words, “All bills must be paid by check to our order or in current funds at our

office,” printed in red at the top. About two weeks afterward, the agent called for and received payment, giving to the purchasers a receipted bill bearing the same notice in red letters that appeared upon the bill sent with the goods. The agent embezzled the money. The court said: “The plaintiff seeks to charge the defendants with knowledge that payment was required to be made according to the terms of the notice in red letters upon the bill sent with the goods. The defendants did not see the notice, nor, taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it. It is not so prominent upon the bill as to become a distinctive feature of it, one that would be likely to attract attention in the hurry of business and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have inclosed the bill in a letter of advice, calling the attention of the defendants to the fact that he was unwilling to intrust collections to his agent.”

See also *Luckie v. Johnson*, 89 Ga. 321, 15 S. E. R. 459; *Kinsman v. Kershaw*, 119 Mass. 140; *Wass v. Insurance Co.*, 61 Me. 537; *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655.

becomes aware that the assumed principal was merely the agent of another, the purchaser has, in good faith and the exercise of reasonable prudence, made payments to the agent,¹ or has acquired an offset against him,² such payment or set-off will be operative against the principal.

§ 1452. —. If, however, the agent, as in the case of a mere broker, had no such possession or *indicia* of ownership, or if the purchaser has acted in bad faith or had reasonable grounds to believe that the person with whom he dealt was really but an agent, then the payment or set-off cannot prevail against the claims of the real principal when discovered.³

§ 1453. **When authority to receive payment implied from possession of the securities.**— Authority to receive payment on securities may often be implied from their possession by the agent. Thus, where a sale has been made by an agent, and a note or bond or mortgage has been taken for the price, and the security is left in the agent's possession and control, authority to make payments thereon to the agent may, in the absence of directions to pay it elsewhere, be implied.⁴ But the

¹ Mechem on Agency, § 773; Ex parte Dixon, 4 Ch. Div. 133; Peel v. Shepherd, 58 Ga. 365; Eclipse Wind Mill Co. v. Thorson, 46 Iowa, 181; Tripp Boot & Shoe Co. v. Martin, 45 Kan. 765, 26 Pac. R. 424; Frame v. Coal Co., 97 Pa. St. 309; Maxfield v. Carpenter, 84 Hun (N. Y.), 450.

² Mechem on Agency, § 773; Bernshouse v. Abbott, 45 N. J. L. 531, 46 Am. R. 789; Bertoli v. Smith, 69 Vt. 425, 38 Atl. R. 76; Baring v. Corrie, 2 B. & Ald. 137; Ex parte Dixon, 4 Ch. Div. 133; Semenza v. Brinsley, 18 Com. B. (N. S.) 467; Borries v. Imperial Bank, L. R. 9 Com. P. 38; Crosby v. Hill, 39 Ohio St. 100; Talboys v. Boston, 46 Minn. 144, 48 N. W. R. 688; Pratt v. Collins, 20 Hun (N. Y.), 126; Harrison v. Ross, 44 N. Y. Super. 230.

³ Mechem on Agency, § 774; Bertoli v. Smith (1897), 69 Vt. 425, 38 Atl. R. 76; Miller v. Lea, 35 Md. 396, 6 Am. R. 417; Frame v. Coal Co., 97 Pa. St. 309; Wright v. Cabot, 89 N. Y. 570; McLachlin v. Brett, 105 N. Y. 391, 12 N. E. R. 17; Hogan v. Shorb, 24 Wend. (N. Y.) 458; Bliss v. Bliss, 7 Bosw. (N. Y.) 339; Nichols v. Martin, 35 Hun (N. Y.), 168; Childers v. Bowen, 68 Ala. 221; Baring v. Corrie, *supra*; Mildred v. Hermano, 8 App. Cas. 874; New Zealand Land Co. v. Ruston, 5 Q. B. Div. 474.

⁴ Haines v. Pohlmann, 25 N. J. Eq. 179; Williams v. Walker, 2 Sandf. (N. Y.) Ch. 325; Hatfield v. Reynolds, 34 Barb. (N. Y.) 612; Van Keuren v. Corkins, 4 Hun (N. Y.), 129.

presumption in these cases is founded upon the agent's possession of the securities, and it ceases when the securities are withdrawn by the creditor;¹ and it is incumbent upon the debtor to assure himself on each occasion when a payment is made that they still continue in the agent's possession, or the payment will not bind the principal, unless his conduct has been such as to estop him to deny the agency.²

But authority to receive payment of a note payable to the order of the principal and not indorsed by him cannot be presumed from the mere possession by the assumed agent.³

This rule does not conflict with that already noticed,⁴ that the mere possession of the bill or statement of an account, though made upon the principal's bill-head and in his handwriting, does not imply authority to receive payment of it. Securities for the payment of money stand obviously upon other ground.

§ 1454. Whether authority to receive payment implied from relation of parties — Husband and wife — Parent and child.— Authority to receive payment cannot be implied merely from the existence of one of the so-called domestic relations, unless, as in the case of guardianship of the estate as well as of the person, the power of business representation has been legally conferred. Thus, it need scarcely be stated, perhaps, that the husband or wife has, as such, no implied power to receive pay-

¹Guilford v. Stacer, 53 Ga. 618; Megary v. Funtis, 5 Sandf. Sup. Ct. (N. Y.) 376; Brown v. Blydenburgh, 7 N. Y. 141; Cooley v. Willard, 34 Ill. 68, 85 Am. Dec. 296.

²Smith v. Kidd, 68 N. Y. 130, 23 Am. R. 157; Brown v. Blydenburgh, 7 N. Y. 141; Kellogg v. Smith, 26 N. Y. 18; Purdy v. Huntington, 42 N. Y. 334; Wolford v. Young (1898), 105 Iowa, 512, 75 N. W. R. 349; Harrison v. Le Gore (1899), 109 Iowa, 618, 80 N. W. R. 670; Bartel v. Brown (1899), 104 Wis. 493, 80 N. W. R. 801; Bloomer v. Dau (1899), 122 Mich. 522,

81 N. W. R. 331; Western Security Co. v. Douglas (1896), 14 Wash. 215, 44 Pac. R. 257; Trull v. Hammond (1898), 71 Minn. 172, 73 N. W. R. 642; Rhodes v. Belchee (1899), 36 Oreg. 141, 59 Pac. R. 117; Williams v. Walker, *supra*; Hatfield v. Reynolds, *supra*; Van Keuren v. Corkins, *supra*; Megary v. Funtis, *supra*; Haines v. Pohlmann, *supra*; Cooley v. Willard, *supra*; Brewster v. Carnes, 103 N. Y. 556, 9 N. E. R. 323.

³Doubleday v. Kress, 50 N. Y. 410, 10 Am. R. 502.

⁴See *ante*, § 1445.

ment for the other.¹ Authority for that purpose may, of course, be expressly conferred, or it may be implied from circumstances as in other cases,² but it does not exist as the mere consequence of the marriage relation. The same is true also of parent and child. Neither party, by virtue of that relation alone, has implied authority to receive payment for the other, though the authority may be conferred as in other cases.³

2. Construction of the Authority.

§ 1455. **Can receive nothing but money.**—An agent authorized merely to collect a demand or to receive payment of a debt cannot bind his principal by any arrangement short of an actual collection and receipt of the money.⁴ He cannot, therefore, take in payment the note of the debtor payable either to himself,⁵ or to his principal;⁶ or the note or bond of himself,⁷ or of a third person;⁸ or a draft or order on a stranger,⁹

¹ See Mechem on Agency, §§ 62, 63.

² See *Stanton v. French*, 83 Cal. 194, 23 Pac. R. 355.

³ See Mechem on Agency, §§ 51, 59, 86.

⁴ *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. R. 12; *McCormick v. Wood, etc. Co.*, 72 Ind. 518; *O'Conner v. Arnold*, 53 Ind. 203; *Ward v. Smith*, 7 Wall. (U. S.) 447; *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *Rodgers v. Bass*, 46 Tex. 505; *Moore v. Pollock*, 50 Neb. 900, 70 N. W. R. 541; *Stuart v. Burcham*, 50 Neb. 823, 70 N. W. R. 383; *Nicholson v. Pease*, 61 Vt. 534, 17 Atl. R. 720; *Scully v. Dodge*, 40 Kan. 395, 19 Pac. R. 807; *Padfield v. Green*, 85 Ill. 529; *Woodbury v. Larned*, 5 Minn. 339; *Trull v. Hammond*, 71 Minn. 172, 73 N. W. R. 642; *McCulloch v. McKee*, 16 Pa. St. 289; *Aultman v. Lee*, 43 Iowa, 404; *Graydon v. Patterson*, 13 Iowa, 256; *McCarver v. Nealey*, 1 G. Greene (Iowa), 360; *Kirk v. Hiatt*, 2 Ind. 322; *Corning v. Strong*, 1 Ind. 329; *Bridges v.*

Garrett, L. R. 5 C. P. 451; *Ward v. Evans*, 2 Ld. Raym. 928; *Powell v. Henry*, 27 Ala. 612; *Taylor v. Robinson*, 14 Cal. 396; *Mathews v. Hamilton*, 23 Ill. 470; *Robson v. Watts*, 11 Tex. 764; *British & Amer. Mtg. Co. v. Tibballs*, 63 Iowa, 468, 19 N. W. R. 319; *Pitkin v. Harris*, 69 Mich. 133, 37 N. W. R. 61.

⁵ *Corning v. Strong*, 1 Ind. 329; *McCulloch v. McKee*, 16 Pa. St. 289; *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. R. 12.

⁶ *Miller v. Edmonston*, 8 Blackf. (Ind.) 291.

⁷ *McCarver v. Nealey*, *supra*.

⁸ *Langdon v. Potter*, 13 Mass. 319; *Wilkinson v. Holloway*, 7 Leigh (Va.), 277; *Smock v. Dade*, 5 Rand. (Va.) 639; *Smith v. Lamberts*, 7 Gratt. (Va.) 138; *Wiley v. Mahood*, 10 W. Va. 206.

⁹ *McCarver v. Nealey*, 1 G. Greene (Iowa), 360; *Drain v. Doggett*, 41 Iowa, 682; *Goldsborough v. Turner*, 67 N. C. 403.

or horses, wheat, merchandise or other property of any kind;¹ or Confederate or other depreciated currency;² or corporate bonds, especially where they are worthless;³ nor can he set off a claim due from himself;⁴ or take property for his own use in payment.⁵

Where, however, the agent was a bank of deposit, it was held, while recognizing the general rule, that it might receive in payment one of its own certificates of deposit.⁶

And so, it has been held, an agent authorized to negotiate a note might accept in place of money a certificate of deposit payable on demand, issued by a solvent bank.⁷

§ 1456. No authority to release or compromise the debt.

It follows, as a corollary of the rule above referred to, that an agent authorized merely to collect or receive payment has no implied power to release the debt, in whole or in part, or to compromise the claim, without payment;⁸ nor can he discharge the

¹ Rhine v. Blake, 59 Tex. 240; Wright v. Daily, 26 Tex. 730; Kent v. Ricards, 3 Md. Ch. 392; Harper v. Harvey, 4 W. Va. 539; Kirk v. Hiatt, 2 Ind. 322; Aultman v. Lee, 43 Iowa, 404; Martin v. United States, 2 T. B. Monr. (Ky.) 89, 15 Am. Dec. 129; Reynolds v. Ferree, 86 Ill. 570; Hayes v. Colby, 65 N. H. 192, 18 Atl. R. 251; Williams v. Johnston, 92 N. C. 532, 53 Am. R. 428; Pitkin v. Harris, 69 Mich. 133, 37 N. W. R. 61.

² Webster v. Whitworth, 49 Ala. 201; Fritz v. Stover, 22 Wall. (U. S.) 198. See also Baird v. Hall, 67 N. C. 230. See also 34 L. R. A. 283.

³ Paul v. Grimm (1895), 165 Pa. St. 139, 30 Atl. R. 721, 44 Am. St. R. 648.

⁴ Whitney v. State Bank, 7 Wis. 620; Butts v. Newton, 29 Wis. 632; Stewart v. Woodward, 50 Vt. 78, 28 Am. R. 488; Rodick v. Coburn, 68 Me. 170; Union School Fur. Co. v. Mason, 3 S. Dak. 147, 52 N. W. R. 671; Deatherage v. Henderson, 43 Kan. 684, 23

Pac. R. 1052; Greenwood v. Burns, 50 Mo. 52; McCormick v. Keith, 8 Neb. 143; Irwin v. Workman, 3 Watts (Pa.), 357; Coffman v. Hampton, 2 Watts & Serg. (Pa.) 377; Bridges v. Garrett, L. R. 5 C. P. 451; Sykes v. Giles, 5 M. & W. 645; Scott v. Irving, 1 B. & Ad. 605; Catterall v. Hindle, L. R. 1 C. P. 187; Hurley v. Watson, 68 Mich. 531, 36 N. W. R. 726; Stetson v. Briggs, 114 Cal. 511, 46 Pac. R. 603; Smith v. James, 53 Ark. 135, 13 S. W. R. 701.

⁵ Williams v. Johnston, 92 N. C. 532, 53 Am. R. 428.

⁶ British, etc. Mortgage Co. v. Tibbals, 63 Iowa, 468, 19 N. W. R. 319.

⁷ Poorman v. Woodward, 21 How. (U. S.) 266, 1 Myer's Fed. Dec., § 61.

⁸ Herring v. Hottendorf, 74 N. C. 588; Murphy v. Kastner, 50 N. J. Eq. 214, 24 Atl. R. 564; McHany v. Schenk, 88 Ill. 357; Melvin v. Lamar Ins. Co., 80 Ill. 446; Baird v. Randall, 58 Mich. 175, 24 N. W. R. 659; Nolan

debtor and assume the debt himself,¹ thus making himself the debtor of his principal without the latter's consent.

§ 1457. **May receive part payment.**— Authority to collect or receive payment of the whole of a demand implies power to collect or receive a part payment to apply upon it.²

§ 1458. **But may not extend time.**— But although he is thus authorized to receive payment in part, he cannot upon such payment, or in consideration of it, extend the time of payment of the balance.³ Nor can he extend the time without express authority in any case.⁴

§ 1459. **Not authorized to receive before due.**— And even though an agent have authority to receive payment of an obligation, this does not authorize him to receive it before it is due,⁵ in the absence of a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, extending the ordinary reach of the authority.⁶

§ 1460. **No authority to take checks.**— Being authorized to receive nothing but money, the agent has no implied power to accept checks.⁷ Of course if the check is paid it is a good pay-

v. Jackson, 16 Ill. 272; Whittington v. Ross, 8 Ill. App. 234; Sonneboom v. Moore (1898), 105 Ga. 497, 30 S. E. R. 947.

¹ Miles v. Richwine, 2 Rawle (Pa.), 199, 19 Am. Dec. 638; Chambers v. Miller, 7 Watts (Pa.), 63; Cooney v. Wade, 4 Humph. (Tenn.) 444, 40 Am. Dec. 657.

² Whelan v. Reilly, 61 Mo. 565.

³ Hutchings v. Munger, 41 N. Y. 153; Ritch v. Smith, 82 N. Y. 627; Gerrish v. Maher, 70 Ill. 470.

⁴ Chappell v. Raymond, 20 La. Ann. 277; Lockhart v. Wyatt, 10 Ala. 231, 44 Am. Dec. 481.

⁵ Smith v. Kidd, 68 N. Y. 130, 23

Am. R. 157; Doubleday v. Kress, 50 N. Y. 410, 10 Am. R. 502; Fellows v. Northrup, 39 N. Y. 117; Dilenbeck v. Rehse, 105 Iowa, 749, 73 N. W. R. 1072; Little Rock & Ft. S. R. Co. v. Wiggins, 65 Ark. 385, 46 S. W. R. 731; Campbell v. Hassel, 1 Stark. 233; Parnther v. Gaitskell, 13 East, 432. But see Bliss v. Cutter, 19 Barb. (N. Y.) 9.

⁶ Thompson v. Elliott, 73 Ill. 221; Smith v. Hall, 19 Ill. App. 17; Thornton v. Lawther, 169 Ill. 238, 48 N. E. R. 412; Harrison v. Le Gore, 109 Iowa, 618, 80 N. W. R. 670.

⁷ Hall v. Storrs, 7 Wis. 253.

ment,¹ but if the drawee fails to pay, it is not payment; and if a loss results, the agent also will be liable.²

§ 1461. If authorized to take check or note, has no authority to indorse and collect it.— But even if authorized to accept checks in payment of the demand, the agent has no implied authority to indorse them and collect the money thereon, and the bank paying the check so indorsed is still liable to the principal for the amount thereof.³

So an agent authorized to accept a note in settlement of a debt has no implied power, after delivering it to his principal, to receive payment of the note.⁴

§ 1462. Authority to collect does not authorize sale.— Authority to an agent to collect or receive payment of a note or other demand does not imply power to sell, transfer, or otherwise dispose of it.⁵ Nor will authority to an agent to accept a note in settlement of a demand, imply power in the agent to afterward sell the note so taken.⁶

§ 1463. No authority to deal with funds collected.— An agent authorized to collect and transmit funds to his principal has no implied authority to enter into any contract concerning the money in his hands or to exchange it for other money with third persons. Such conduct may be treated by the principal as a conversion of the funds.⁷

¹ *Bridges v. Garrett*, L. R. 5 C. P. 451. Am. R. 88, 7 N. W. R. 524, 8 N. W. R. 797.

² *Harlan v. Ely*, 68 Cal. 522, 9 Pac. R. 947. ⁵ *Smith v. Johnson*, 71 Mo. 382; *Texada v. Beaman*, 6 La. 84, 25 Am. Dec. 204; *Hardesty v. Newby*, 28 Mo. 567, 75 Am. Dec. 137; *Quigley v. Mexico Southern Bank*, 80 Mo. 289, 50 Am. R. 503.

³ *Graham v. United States Saving Inst.*, 46 Mo. 186; *Thompson v. Bank*, 82 N. Y. 1; *Robinson v. Chemical Bank*, 86 N. Y. 404; *Millard v. Republic Bank*, 3 MacArthur (D. C.), 54; *McClure v. Evartson*, 14 Lea (Tenn.), 495; *Holtsinger v. National, etc. Bank*, 6 Abb. (N. Y.) Pr. (N. S.) 292; *Hogg v. Smith*, 1 Taunt. 347.

⁴ *Draper v. Rice*, 56 Iowa, 114, 41 Am. R. 88, 7 N. W. R. 524, 8 N. W. R. 797. ⁶ *Ames v. Drew*, 31 N. H. 475. ⁷ *Darling v. Younker*, 37 Ohio St. 487, 41 Am. R. 532; *Kent v. Bornstein*, 12 Allen (Mass.), 342; *Greenwald v. Metcalf*, 28 Iowa, 363.

⁴ *Draper v. Rice*, 56 Iowa, 114, 41

§ 1464. **May give receipt or discharge.**—An agent authorized to collect has implied authority to give to the debtor upon payment such a receipt or discharge as the payment entitles him to receive. Thus, if the debt be evidenced by a note or other security, the agent, upon payment, may deliver the security to the debtor.¹

VI.

BY WHOM PAYMENT TO BE MADE.

§ 1465. **By purchaser or his agent.**—Payment to be operative must of course ordinarily be made by the purchaser or by his agent whose act has either been previously authorized or subsequently ratified.

§ 1466. **By stranger.**—The effect of the payment of a debt by a stranger to it is a question upon which there is a conflict among the authorities. Early English cases, followed by cases in this country, have held that such a payment does not constitute a satisfaction of the debt, unless such payment was previously authorized or subsequently ratified by the debtor in some other way at least than the mere reliance upon such payment as a bar.²

§ 1467. —. But the rule sustained by the weight of authority seems to be that where the stranger, acting in behalf of the debtor, tenders the money as payment to the creditor, who accepts it as such, the debt, so far as the creditor is concerned, is extinguished, and can no longer be enforced by the creditor against the debtor.³ As to the person who so pays, it

¹ Padfield v. Green, 85 Ill. 529.

² See Grymes v. Blofield, Croke, Eliz. 541; Simpson v. Eggington, 10 Exch. 845; Edgecombe v. Rodd, 5 East, 294; Goodwin v. Cremer, 18 Q. B. 757; Kemp v. Balls, 10 Exch. 607; Jones v. Broadhurst, 9 C. B. 173; Belshaw v. Bush, 11 C. B. 191; James v. Isaacs, 12 C. B. 791; Lucas v. Wilkin-

son, 1 H. & N. 420; Bleakley v. White, 4 Paige (N. Y.), 654; Clow v. Borst, 6 Johns. (N. Y.) 37; Daniels v. Hallenbeck, 19 Wend. (N. Y.) 408; Atlantic Dock Co. v. New York, 53 N. Y. 64; Whiting v. Insurance Co., 15 Md. 297; Stark v. Thompson, 3 T. B. Mon. (Ky.) 296.

³ See Crumlish v. Central Improve-

is said that he may then, by suit in equity, either compel the debtor to ratify the act as one done on his account and thus make himself liable to refund, or, if the debtor refuse to ratify, that the debt be enforced in the payor's favor as an equitable assignee against the debtor.¹

ment Co., 38 W. Va. 390, 18 S. E. R. 456, 45 Am. St. R. 872, 23 L. R. A. 120, and note; Gray v. Herman, 75 Wis. 453, 44 N. W. R. 248, 6 L. R. A. 691; Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334; Harrison v. Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638; Webster v. Wyser, 1 Stew. (Ala.) 184;

Cain v. Bryant, 12 Heisk. (Tenn.) 45; Martin v. Quinn, 37 Cal. 55; Harvey v. Tama County, 53 Iowa, 228, 5 N. W. R. 130.

¹ See *Crumlish v. Central Improve. ment Co.*, *supra*, and the exhaustive note in 23 L. R. A. 120.

BOOK V.

OF REMEDIES FOR NON-PERFORMANCE.

CHAPTER I.

PURPOSE OF BOOK V.

§ 1468. In general.

1469. How remedies classified.

§ 1468. In general.—In previous portions of this work attention has been given to the making of the contract of sale, to its effect in passing the property, to the means and occasion for its avoidance, and to the question of its performance, if not so avoided. There remains finally to be considered the question of the remedies of which the respective parties may avail themselves if the contract be not performed.

§ 1469. How remedies classified.—This question of the remedies naturally presents two aspects: 1. The remedies of the seller; and 2. The remedies of the buyer.

Of the remedies of the seller there may be two sorts: Remedies against the goods, and remedies against the buyer personally.

The remedies of the buyer, however, are chiefly, if not entirely, personal in their character.

The treatment, therefore, will be in the following order:

I. The remedies of the seller against the goods.

II. The remedies of the seller against the buyer personally.

III. The remedies of the buyer against the seller.

Each of these will be made the subject of a separate chapter.

CHAPTER II.

OF THE REMEDIES OF THE SELLER AGAINST THE GOODS.

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- § 1614-1616. Nature of this right.
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- IV. OPTION OF SELLER AS TO REMEDIES.
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- 1645, 1646. General considerations.
- 1647, 1648. Choice of remedies.
1649. Nature of right of resale.
1650. How resale should be made.

§ 1470. **In general.**—Although the dealings between the parties may have been such that the title to the goods has passed, still, as has been seen on several occasions, the delivery of the goods by the seller is deemed to be required only upon payment for them, unless the parties have otherwise agreed, and therefore the seller may retain possession until payment is made. This right of the seller grows out of the fact of his previous ownership of the goods, and is in furtherance of the presumed intention of the parties, where no term of credit is given, that the seller shall not part with the possession until the concurrent act of payment is performed.

§ 1471. —. Precisely what is the nature of the seller's right in these cases, the courts have found it difficult to determine. All agree that the seller has *at least* a lien, and the right is often spoken of as the seller's lien; but it is clear that it is something more than a mere lien, and, if a lien, it is a lien of an unusual sort and with more than the usual characteristics. Thus, in a somewhat early case,¹ the court said that the seller has "not what is commonly called a lien determinable on the loss of possession, but a *special interest*, sometimes but improperly called a lien, *growing out of his original ownership, independent of the actual possession*, and consistent with the *property* being in the buyer." And in a later case² in Rhode Island, the court said: "The vendor's lien is not a right which he *acquires*, but a right which he *retains*, the vendee never having had either possession or right of possession, in default of payment or tender. It is in the nature of an undisposed-of right in and to the property sold to the defaulting vendee." "An unpaid vendor," says Mr. Benjamin, "with the goods in his possession, has more than a mere lien on them; he has a special property analogous to that of a pawnee."

§ 1472. —. Inasmuch, however, as the seller's interest is often spoken of as a lien, and is at least a lien, and because for

¹Dodsley v. Varley, 12 Ad. & El. 632.

²Arnold v. Carpenter, 16 R. I. 560, 18 Atl. R. 174.

many purposes the right of lien suffices for the protection of the seller, it seems convenient to consider it first as a lien, and to proceed from thence to consider its further characteristics wherein it exceeds a lien.¹

I.

THE SELLER'S LIEN.

§ 1473. **What here included.**—Adopting, therefore, the method referred to in the preceding section, there will be consideration of —

1. The lien in general.
2. Waiver or abandonment of the lien.
3. Estoppel in favor of a sub-purchaser.
4. Revival of lien on buyer's insolvency.
5. Revival of lien on expiration of credit.
6. Effect of a tender of the price.
7. Effect of claiming the lien.

1. *Of the Lien in General.*

§ 1474. **Seller has a lien to secure payment.**—As stated in the preceding sections, it is everywhere conceded that the seller of goods which still remain in his possession, and concerning which no special agreement as to delivery or payment has been made, has, unless he has waived it, a lien upon those goods to enforce the payment of the price, and may, for that purpose, retain possession of them until the price is paid. This right, of course, implies that the title to the goods has passed

¹So in *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. R. 1124, 34 Am. St. R. 531, it is said: "The right of the unpaid vendor with respect to the goods is sometimes called a lien; and it is a lien in the sense that the vendee, upon payment or tender of the price, but not otherwise, may recover them. But it is something more than a mere

common-law lien, which is only a naked right of possession. With the goods in his possession the vendor has a special property in them which is parcel of his original ownership."

For a more detailed examination than is practicable in these pages, see Jones on Liens (ed. 1888), § 800 *et seq.*

to the vendee, for the seller can have no lien upon goods which still remain his own.¹

§ 1475. What the lien secures.—This lien extends only to the purchase price of the goods. "If, by reason of the vendee's default, the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such claim, and the vendor's remedy, *if any*, is personal against the buyer."² It does not extend, for example, to dock charges incurred by one who, in order to preserve his lien, has kept in dock a ship he had repaired during the delay of the owner to receive her and pay the repairs;³ nor to the claim of a railroad company to demurrage for unreasonable detention of cars before unloading.⁴

¹ Thus, in *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754, *Adam's Cases*, 7, *Shaw, C. J.*, said: "When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has, by the common law, a lien for the price; in other words, he is not bound actually to part with the possession of the goods without being paid for them. The term 'lien' imports that by the contract of sale, and a formal, symbolical or constructive delivery, the property has vested in the vendee; because no man can have a lien on his own goods. The very definition of a lien is, a right to hold goods, the property of another, in security for some debt, duty or other obligation."

See also *Burke v. Dunn*, 117 Mich. 430, 75 N. W. R. 931; *Southwestern Freight Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Southwestern Freight Co. v. Plant*, 45 Mo. 517; *Ware River R. Co. v. Vibbard*, 114 Mass. 447; *Safford v. McDonough*, 120 Mass. 290; *Curtin v. Isaacsens*, 36 W. Va. 391, 15

S. E. R. 171; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. R. 899; *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. R. 1113.

² *Jones on Liens*, § 804; *Benjamin on Sales* (6th Am. ed.), § 796.

³ *Somes v. Shipping Co.*, El. Bl. & El. 353, 8 H. L. Cas. 338.

⁴ *Mechem's Hutchinson on Carriers*, § 478; *East Tennessee R. Co. v. Hunt*, 15 Lea (Tenn.), 261; *Crommelin v. New York & H. R. Co.*, 4 Keyes (N. Y.), 90.

So, in *Putnam v. Glidden*, 159 Mass. 47, 38 Am. St. R. 394, 34 N. E. R. 81, it is said: "Where the vendee contends that the property is not his, and treats it as belonging to the vendor, and the vendor elects to keep it for the vendee and sue for the entire contract price, there is no implied contract on the part of the vendee to pay the vendor the expense of keeping it. *Whiting v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 130 Mass. 596."

§ 1476. **What claims the lien precedes.**—The vendor's lien, while it remains in force, precedes, of course, all claims arising since the lien accrued, of the vendee, his assignees or his attaching creditors, unless the vendor has been estopped from asserting it.¹

2. *Waiver or Abandonment of Lien.*

§ 1477. **Waiver of the lien — Expressly or by implication.** The lien of the vendor is a right which the law gives him for his own benefit and protection, and it may therefore be waived by him if he see fit to do so. This waiver may be either express or implied. The express waiver may be either in the form of a specific relinquishment, or of some specific stipulation for security which would supersede the lien. Thus it was said in a leading case² by Lord Westbury: "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.*"

§ 1478. — The lien may also be waived by implication, says Mr. Benjamin,³ "at the time of the *formation* of the contract, when the terms show that it was not contemplated that the vendor should retain possession till payment; and it may be abandoned during the *performance* of the contract by the vendor's actually parting with the goods before payment."

§ 1479. — **Waiver by giving credit.**—The lien is waived by implication where the seller, without stipulating otherwise,

¹ Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. R. 348; Robinson v. Morgan, 65 Vt. 37, 25 Atl. R. 899.

² Chambers v. Davidson, L. R. 1 Pr. Coun. 296.

Bullock, 52 N. H. 354.

³ Benjamin on Sale (6th Am. ed.), § 797. See also Jones on Liens, § 848.

gives credit for the price.¹ “*Conventio legem vincit*,” said Chief Justice Shaw; “and when a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession.”² “It is, of course, competent,” says Mr. Benjamin,³ “for the parties to agree expressly that the goods, though sold on credit, are not to be delivered till paid for; but unless this special agreement, or an established usage to the same effect in the particular trade of the parties, can be shown, selling goods on credit means *ex vi terminorum* that the buyer is to take them into his possession, and the vendor is to trust to the buyer’s promise for the payment of the price at a future time.”⁴

§ 1480. —. This waiver, however, as will be seen hereafter,⁵ is a conditional one, based upon the implied understanding that the buyer shall keep his credit good, and the lien will revive if the vendee proves insolvent while the vendor still retains the goods or any part of them in his possession.

§ 1481. — **Waiver by taking bill or note.**— The lien is also waived, in the absence of an agreement to the contrary, where the seller takes from the buyer a promissory note, bill of exchange, or other security, payable at a future day;⁶ for this would operate as an extension of credit until maturity of

¹ Jones on Liens, § 850.

² In *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754, Adam’s Cases, 7.

³ Benjamin on Sale (6th Am. ed.), § 797, quoted in *McElwee v. Lumber Co.*, 69 Fed. R. 302, 16 C. C. A. 232, 37 U. S. App. 266.

⁴ To same effect: *Arnold v. Delano*, *supra*; *Erwin v. Torrey*, 8 Martin (La.), 90, 13 Am. Dec. 279.

⁵ See *post*, § 1521.

⁶ Jones on Liens, § 850; *Chambers v. Davidson*, L. R. 1 Pr. Coun. 296; *Hewison v. Guthrie*, 2 Bing. N. C. 755; *Hornecastle v. Farron*, 3 B. & Ald. 497; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. R. 302, 16 C. C. A. 232, 37 U. S. App. 266; *Leonard v. Davis*, 1 Black (U. S.), 476; *McCraw v. Gilmer*, 83 N. C. 162; *McNail v. Ziegler*, 68 Ill. 224; *Thompson v. Wedge*, 50 Wis. 642, 7 N. W. R. 560.

the instrument; though such would not be the effect if the note is payable on demand.¹

The lien, however, though waived by taking the security, will revive, as noted in a later section,² if the maker before payment is found to be insolvent or the note is dishonored while the goods are still in the possession of the seller.

§ 1482. Lien abandoned by unconditional delivery.—The lien of the seller being a right to retain the goods to coerce payment, its existence necessarily depends upon and is limited to the seller's continuance of possession. An absolute and unconditional surrender of possession by the seller, therefore, must clearly operate as an abandonment of his lien and deprive him of his right to insist upon payment as a condition precedent to or contemporaneous with delivery.³ And this will be true, even though the buyer is insolvent and knows that he will be unable to pay for the goods. There may be grounds for a rescission, but there is no lien.⁴

§ 1483. —. The question, however, of what shall constitute such a delivery as will defeat his lien is one which is full of difficulty. The actual, absolute and unconditional delivery of the physical possession of the goods to the buyer leaves no room for controversy, but when the field of constructive, symbolical, sub-

¹ Jones on Liens, § 854; Clark v. Draper, 19 N. H. 419.

² See *post*; § 1508 *et seq.*

³ Brownell Car Co. v. Barnard, 116 Mo. 667, 22 S. W. R. 503; Straus v. Rothan, 102 Mo. 261, 14 S. W. R. 940; Lewis v. Steiner, 84 Tex. 364, 19 S. W. R. 516; Slack v. Collins, 145 Ind. 569, 42 N. E. R. 910; Jenkins v. Eichelberger, 4 Watts (Pa.), 121, 28 Am. Dec. 691; Neal v. Boggan, 97 Ala. 611, 11 S. R. 809; Husted v. Ingraham, 75 N. Y. 251; Parker v. Baxter, 86 N. Y. 586; Smith v. Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; Haskins v. Warren, 115 Mass. 514; Freeman

v. Nichols, 116 Mass. 309; Cole v. Berry, 42 N. J. L. 308, 36 Am. R. 511; Muskegon Booming Co. v. Underhill, 43 Mich. 629, 5 N. W. R. 1073; Thompson v. Wedge, 50 Wis. 642, 7 N. W. R. 560; Lupin v. Marie, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256; James v. Bird, 8 Leigh (Va.), 510, 31 Am. Dec. 668; Beam v. Blanton, 3 Ired. Eq. (N. C.) 59; Blackshear v. Burke, 74 Ala. 239.

Statutes making the property specially subject to executions for the purchase price have not altered the rule. Straus v. Rothan, *supra*.

⁴ Johnson v. Farnum, 56 Ga. 144.

stituted or partial delivery is entered, embarrassing questions at once present themselves. The word "delivery," as has been already seen, is used with a variety of significations having some points of similarity, but also some of difference. There are, for example, the delivery which shall satisfy the statute of frauds, the delivery which will suffice to pass the title, the delivery due in performance of the contract, and, now, the delivery which shall mark the abandonment of the seller's lien. The purpose here is to discuss this latter type with its more important variations of form.

§ 1484. — It is, of course, true that the effect of a delivery which would otherwise defeat the lien may be altered by an express agreement which in some form preserves it;¹ but that subject belongs to the field of lien by contract, and not to that which includes only liens arising by implication of law like the one now under consideration.

§ 1485. — **Lien not lost by delivery which passes the title but does not change possession.**— In pursuance of a distinction referred to in the preceding section, it is to be observed that the lien is not lost by such a delivery as may be sufficient to pass the title but which does not involve an actual change of possession. Thus the lien is not divested by such acts as marking the goods in the buyer's name, weighing, measuring or setting them aside, boxing them up by the buyer's orders and putting his name upon them, so long as the seller retains the actual possession of the goods and has not given credit for the price.²

¹ Thus in *Gregory v. Morris*, 96 U. S. 619, it is said: "The lien at common law of the vendor of personal property to secure the payment of purchase-money is lost by the voluntary and unconditional delivery of the property to the purchaser; but this does not prevent the parties from contracting for a lien which, as be-

tween themselves, will be good after delivery."

² *Perrine v. Barnard*, 142 Ind. 448, 41 N. E. R. 820; *Wanamaker v. Yerkes*, 70 Pa. St. 443; *Curtin v. Isaacsen*, 36 W. Va. 391, 15 S. E. R. 171; *Southwestern F. & C. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Sigerson v. Kahman*, 39 Mo. 206; *Owens v. Weed-*

§ 1486. —. And even if he has given credit for the price, the lien, as will be seen, revives if the buyer proves to be insolvent while the goods still remain in the possession of the seller.¹

§ 1487. — **So lien not lost if possession retained though seller's attitude has changed.**— So, again, it is well settled that the fact that the seller's attitude to the goods or the buyer may have changed will not, unless some element of estoppel has intervened, operate to destroy his lien, so long as he actually retains the possession of the goods. Thus it is clear that, cases of estoppel hereafter considered being not involved, the seller does not lose his lien merely by becoming bailee or warehouseman of the buyer in respect of the goods sold,² even though as such warehouseman he charges the buyer with rent for storing and keeping the goods.³ And even though, by giving credit or otherwise, the lien should be suspended for a period, it will, no element of estoppel intervening, revive, as noticed in a later section,⁴ if the buyer proves insolvent before an actual delivery of the goods.

§ 1488. — **Lien not lost by special and qualified delivery.** There may, moreover, be such a special and qualified surrender of the present custody of the goods as will not amount to an abandonment of the lien. Thus a temporary and qualified delivery of the goods to the purchaser for the purpose of examination only will not effect a surrender of the lien;⁵ and a usage of trade to make such a delivery may confirm its character; but

man, 82 Ill. 409; Thompson v. Balt. & O. R. Co., 28 Md. 396; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Goodall v. Skelton, 2 H. Bl. 316; Dixon v. Yates, 5 B. & Ad. 313; Simmons v. Swift, 5 B. & Cr. 857; Townley v. Crump, 4 A. & E. 58; Proctor v. Jones, 2 C. & P. 532; Boulter v. Arnott, 1 C. & M. 333.

¹ Arnold v. Delano, *supra*; *post*, § 1508 *et seq.*

² See Townley v. Crump, 4 Adol. & El. 58. Compare Chapman v. Searle (1825), 3 Pick. (Mass.) 38.

³ See Miles v. Gorton, 2 Crompt. & M. 504.

⁴ See *post*, § 1508 *et seq.*

⁵ Haskins v. Warren (1874), 115 Mass.

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if the delivery is really absolute, a usage that it should not terminate the lien would not be operative.¹

§ 1489. — The seller may also let the buyer into temporary possession in some other character than that of buyer without losing his lien; as, for example, where the buyer temporarily borrows the article or takes it to hold as bailee of the seller.²

§ 1490. — **Lien not lost if possession secured by fraud.** So if by artifice or evasion the buyer obtains possession of the goods, as upon a promise or understanding of immediate payment which afterwards is evaded or denied, the seller, who has done nothing to estop himself or waive his right, may regain possession by virtue of his lien as against any one but a *bona fide* purchaser for value.³

§ 1491. — **How when goods already in possession of buyer.**—If, at the time of the sale, the goods are already in the possession of the buyer, with the seller's consent, as where the buyer is holding them as the seller's agent, the transfer of the title will, unless otherwise stipulated, operate as a transfer of the possession, and the lien of the seller will not exist.⁴ This result, however, may be changed by the contract of the parties stipulating that a lien shall exist, or that the buyer's possession shall be deemed to be the possession of the seller until the price is paid.

§ 1492. — **How when buyer has changed character of property.**—Where there was a contract of sale of standing timber which the vendee was to cut into wood for the market, and he had cut it and removed a part, it was held that the

¹ Haskins v. Warren, *supra*.

³ See Manning v. Hollenbeck (1870),

² Benjamin on Sale (6th Am. ed.), 27 Wis. 202.

§ 807; Tempest v. Fitzgerald (1820), ⁴ Benjamin on Sale (6th Am. ed.),
3 B. & Ald. 680; Marvin v. Wallis § 802; Jones on Liens, § 813; Edan
(1856), 6 El. & Bl. 726; Caldwell v. v. Dudfield, 1 Q. B. 302; Warden v.
Tutt (1882), 78 Tenn. (10 Lea), 258. Cf. Marshall, 99 Mass. 305; Linton v.
Marseilles Mfg. Co. v. Morgan (1881), Butz, 7 Pa. St. 89, 47 Am. Dec. 501.
12 Neb. 66.

seller had no lien on the residue for the price. "We know of no case," said the court, "where such a right has been recognized after the vendee has, at his own expense, in pursuance of the contract of sale, changed the character of the property, and by his own labor and money added to its value. By these acts the vendor must be deemed to have parted with his possession and control of the property. The vendee, by himself and his agents, had taken it into his actual possession, and incorporated with it the labor bestowed by him in preparing it for sale. There was therefore such a change of possession from the vendor to the vendee as to defeat any right of lien in the vendor."¹

§ 1493. — How when goods in possession of a bailee.—

Where, however, the goods, at the time of the sale, are in the possession of a warehouseman or other bailee, not the purchaser, the lien of the seller is not lost by the mere fact of the sale or by simple notice to the bailee that the sale has been made; it will continue until by some act or some agreement the relation of the bailee to the seller has been changed and he has consented to become the agent of the buyer in retaining the custody of the goods.²

§ 1494. — But this consent, by the weight of authority, may be given in advance. Thus, where the bailee is a warehouseman and issues receipts designed and used as representatives of the goods in whosoever hands the receipts may subsequently come in the course of commercial transactions, a transfer of the receipt, as will be seen hereafter, will transfer the goods themselves without attornment, so far as the rights

¹ *Douglas v. Shumway* (1859), 13 Gray (Mass.), 498, distinguishing *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754.

² *Jones on Liens*, § 829; *In re Batchelder*, 2 Low. (U. S. D. C.) 245, 2 Fed. Cas. 1013; *Benjamin on Sale* (6th Am. ed.), § 803 [citing *Harman v.*

Anderson, 2 Camp. 243; *Bentall v. Burn*, 3 B. & C. 423; *Lackington v. Atherton*, 7 M. & G. 360; *Farina v. Home*, 16 M. & W. 119; *Godts v. Rose*, 17 C. B. 229; *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dorrien*, 7 Taunt. 278; *Woodley v. Coventry*, 2 H. & C.

of subsequent holders of it are concerned who have no notice of the seller's claims.

§ 1495. — How when goods on public wharf or the premises of a stranger.— When the goods at the time of the sale are lying upon a public wharf or on the premises of a stranger not a bailee of the seller, an actual delivery may more easily be found. Thus, where the sellers of timber deposited it upon a public wharf, and there permitted the buyer to measure and number each tree, mark it with his initials and expend money in "squaring" it, it was held that there was such an actual delivery as divested the seller's lien, even though the buyer became insolvent before paying for the timber.¹ And the same result was reached where the timber was lying upon the premises of a stranger and the buyer took away a part and marked all of the residue. The trees being on the land of a stranger, it was, said the court, "the same thing in effect as if they had been in the warehouse of the purchaser, for he was to enter the land when he pleased to take them away."²

§ 1496. — How when goods are delivered to a carrier.— An unconditional delivery of the goods to a carrier as the buyer's agent for transportation to the buyer terminates the seller's lien;³ but this would not be true where the seller is under contract to deliver and the carrier acts as the agent of the seller. And even in the former case, the seller, as will be seen, may stop them in their transit if the buyer proves to be insolvent.

§ 1497. — The seller's lien, however, is not lost, says Mr. Benjamin,⁴ "by sending goods on board of a vessel in accord-

¹Cooper v. Bill, 3 Hurls. & Colt. 722.

²Tansley v. Turner, 2 Bing. N. Cas. 151.

³Benjamin on Sale (6th Am. ed.), § 804 [citing Dawes v. Peck, 8 T. R. 330; Wait v. Baker, 2 Ex. 1; Fragano v. Long, 4 B. & C. 219; Dunlop v. Lambert, 6 Cl. & F. 600; Johnson v.

Dodgson, 2 M. & W. 653; Norman v. Phillips, 14 M. & W. 277; Meredith v. Meigh, 2 El. & Bl. 364; Cusack v. Robinson, 1 B. & S. 299; Hart v. Bush, El., Bl. & El. 494; Smith v. Hudson, 6 B. & S. 431].

⁴Benjamin on Sale (6th Am. ed.), § 824.

ance with the buyer's instructions, even though by the contract the goods are to be delivered free on board to the buyer, if the vendor on delivering the goods takes¹ or demands² a receipt for them in his own name, for this is evidence that he has not yet parted with his control; the possession of the receipt entitles him to the bill of lading; and the goods, represented by their symbol, the bill of lading, are still in his possession, which can only be divested by his parting with the bill of lading. But if the vessel belonged to the purchaser, the delivery would be complete under such circumstances, and the lien lost."³

§ 1498. — Transfer by bill of lading.—Bills of lading being regarded as the representatives of the goods which they describe,⁴ their indorsement and delivery operate not only to transfer the title, but as a complete delivery of the goods which divests the seller's lien,⁵ though he may, as will be seen, still avail himself of his right to stop them in their transit in a proper case.⁶

§ 1499. Effect of delivery of part of the goods.—As a general rule the delivery of a part of the goods does not operate to release the lien as to the residue. The seller may voluntarily surrender part and retain the rest; and the lien will then attach to the part retained for the price of the whole.⁷ As declared in a recent case, the delivery of a part operates as a delivery of the whole only where it is plain "that such partial delivery was intended as a symbolical delivery of the

¹ Citing *Craven v. Ryder*, 6 Taunt. 433.

² Citing *Ruck v. Hatfield*, 5 B. & Ald. 632.

³ Citing *Cowasjee v. Thompson*, 5 Moore, P. C. 165.

⁴ See *Mechem's Hutchinson on Carriers*, § 129.

⁵ *Benjamin on Sale* (6th Am. ed.), § 813.

⁶ *Post*, § 1525 *et seq.*

⁷ *Jones on Liens*, § 834; *Benjamin*

on Sale (6th Am. ed.), § 805; *Tanner v. Scovell*, 14 Mees. & Wels. 28; *Ex parte Cooper*, 11 Ch. Div. 68 (explaining *Slubey v. Heyward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 B. & P. N. R. 69); *Bunney v. Poyntz*, 4 B. & Ad. 568; *Dixon v. Yates*, 5 B. & Ad. 313; *Williams v. Moore*, 5 N. H. 235; *Wanamaker v. Yerkes*, 70 Pa. St. 443; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. R. 302, 37 U. S. App. 266, 16 C. C. A. 232.

whole and as a waiver of any right of retention as to the remainder."¹

§ 1500. Effect of part payment.—A part payment for the goods, like the part delivery considered in the preceding section, does not operate to defeat the lien as to the residue.² If credit be given for the remainder, it will, like the giving of credit for the whole price, suspend the lien during the period given,³ but the lien will revive upon the expiration of the credit,⁴ or upon the insolvency of the purchaser,⁵ if the goods remain in the actual possession of the seller.

3. *Estoppel in Favor of Sub-purchasers.*

§ 1501. Lien good against sub-purchaser unless seller estopped — Estoppel by conduct.—This right of the seller to assert his lien notwithstanding a constructive delivery is not, in the absence of a statute such as the English Factors Act, affected by a resale to a third person, unless the seller has done something to estop himself from setting up his lien against such sub-purchaser. In the absence of such estoppel, the sub-purchaser acquires no greater rights than his vendor — the original vendee — then had.⁶ Such an estoppel may arise either

¹ *McElwee v. Lumber Co.*, *supra*.

² *Jones on Liens*, § 801; *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. R. 1113; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. R. 899.

³ See *ante*, § 1479.

⁴ See *post*, § 1521.

⁵ See *post*, § 1508 *et seq.*

⁶ Thus in *McElwee v. Metropolitan Lumber Co.*, 69 Fed. R. 302, 37 U. S. App. 266, 16 C. C. A. 232, it was said: "If the defendant in error [the lumber company] is debarred from asserting a vendor's lien upon the insolvency of the vendees, it must be because the plaintiffs in error [the sub-purchasers] have acquired rights as sub-purchasers which the vendor

is estopped from denying or contravening by the assertion of a lien. What are these rights, and what is their origin? As mere sub-purchasers of lumber in the actual possession of the vendor they only acquire the right and interest of the vendees. If at the time they bought the vendor had no lien — no right of retention — then they would acquire the same right to demand delivery. But the right of a vendee who has bought on credit is not an absolute right to demand delivery. The right is dependent upon the preservation of his credit; and, if he becomes insolvent before he obtains actual possession, the lien of the vendor revives, and the

from the conduct of the seller or from the form or contents of the documents he has used to represent the goods. What conduct shall be sufficient to effect such an estoppel cannot, of course, be defined by any inflexible rule, but it must, in general terms, be some act or omission on the part of the seller, reasonably leading the buyer to rely on the assumption that the lien will not be asserted, and which the buyer has so relied upon as to be prejudiced if the lien should now prevail.

§ 1502. — Mere notice to the seller of the resale, to which the seller does not dissent, is not enough;¹ nor is any act consented to by the seller, but which the latter did not know was done in the attitude of a sub-purchaser;² or the fact that, when refusing delivery, the seller did not expressly base his refusal upon the ground of the buyer's insolvency.³

insolvent vendee must pay the purchase price before he can deprive the vendor of the goods remaining in his possession. So if the vendor, for any reason, remain in the actual possession until the period of credit has expired, his lien revives. Now, a sub-vendee buys only this defeasible right of the vendee, and if he does not obtain the actual possession, or obtain from the vendor an actual attornment to him, as in *Hurry v. Mangles*, 1 Campb. 452, and the credit given the vendee expires while the vendor holds the actual possession, or the vendee becomes insolvent, he cannot, in the absence of some estoppel, deprive the unpaid vendor of his actual possession. The rights of sub-vendees have most often been under consideration in cases involving the doctrine of stoppage *in transitu*. But the principle is the same where the transit has not begun. It was well said in *White v. Welsh*, 38 Pa. St. 396, 420, that 'if a vendor has a right of stoppage *in transitu*, a fortiori he has a right of retainer be-

fore any transit has commenced.' Now the right of stoppage *in transitu*, special legislation out of the way, can only be defeated by the transfer of a bill of lading to an indorsee who *bona fide* gave value for it. 2 Benjamin on Sales, § 1285; *Lickbarrow v. Mason*, 5 T. R. 683."

¹ *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. R. 899.

² *Dixon v. Yates*, 5 B. & Adol. 313, where the sub-purchaser was also a clerk of the warehouseman, and the acts which he did, *e. g.*, coopering the casks and gauging them, were referable to his position as clerk.

³ *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. R. 1113, where the court said: "At no time during the negotiations did defendant assign the insolvency of the plaintiff as his reason for demanding cash or security, or give any special reason for doing so, except that when demanding the mortgage he said it was the custom of the trade. On this ground plaintiff's counsel invoke the doctrine that if a person, when called upon to de-

§ 1503. —. But where the seller, when notified of the resale, said it was very well, and permitted the sub-purchaser to mark the goods with his own initials, the seller was held to be

liver, places his right to retain the goods upon a ground inconsistent with a claim by virtue of a specific lien, this is a waiver of the lien; and that on the trial he will not be permitted to rest his refusal upon a different and distinct ground from that on which he claimed to retain the property at the time of the demand. An examination of the authorities on the subject, from the early case of *Boardman v. Sill*, 1 Camp. 410, n., down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so. But no such state of facts exists in this case. While defendant did not specify his vendor's lien by reason of plaintiff's insolvency as the ground of his refusal, yet he never placed his refusal on any ground inconsistent with or independent of it. On the contrary,

from first to last, what he insisted on was payment of, or security for, the price of the property; and the ground of his refusal was the refusal of plaintiff to give either. True, at the last, he announced his positive refusal to furnish the piano unless plaintiff would agree to give a chattel mortgage on it,—a thing which he had no legal right to insist on; but it is very evident that this demand on defendant's part was merely an alternative for payment in cash, which he had a right to demand, but which plaintiff had refused. The plaintiff probably had a right to be informed, as he was, that the property was held for the purchase-money, for that was a matter which he could remedy by payment; but it would have availed him nothing to be informed that defendant's right to retain the property for the price was based on his insolvency, for that was a fact which he could not have changed. We can see nothing in defendant's acts of omission or commission that amounted to a waiver of his title, or which should estop him from now asserting it."

So, in *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. R. 348, it is said: "When the trial began it was moved in behalf of the defendant that the plaintiffs be compelled to elect whether they would seek to recover on the ground that they owned the property or on the ground that they had a lien thereon for unpaid purchase-money. To this request the court replied: 'I will hear the evidence first before I compel him to do that.' To this remark the defend-

estopped from afterwards asserting a lien against the goods;¹ and so he was where, when the sub-purchaser presented an order for the goods from the original purchaser, the seller received it without objection, placed it on file and entered the sub-purchaser's name on his books opposite the entry of the goods;² and so he was, in a similar case, where, before accepting an order for the goods from the original purchaser, the sub-vendee took it to the warehouse of the seller, asked him if "it was all in order," and, on being told that it was, lodged it at the warehouse;³ and so he was where, on the presentation of an order for the goods, he replied "all right," and promised to deliver them.⁴

ants excepted. At the close of the plaintiffs' case, the defendants offering no evidence, both parties asked the court to direct a verdict. The object of requiring plaintiffs to elect between inconsistent causes of action is to simplify the issues of fact so that they may be intelligibly and fairly tried, but it is plain in this case that the defendants were not misled nor harmed by the refusal of the court to compel an election. The plaintiffs' allegation that they owned the property and their allegation that they had a lien thereon for unpaid purchase-money are inconsistent. *Hudson v. Swan*, 83 N. Y. 552. But when, as in the case at bar, the inconsistency plainly appears on the face of the complaint, the defendants should, before answering, move that the plaintiffs be compelled to elect. *Cassidy v. Daly*, 11 W. Dig. 222. If in such a case the defendant lies by until the trial and then moves, the court may, in its discretion, wait until part or all of the evidence is taken before deciding the motion (*Southworth v. Bennett*, 58 N. Y. 659); and its denial is so far discretionary (*Kerr v. Hayes*, 35 N. Y. 331, 336; *People v. Tweed*, 63 id.

194) that it will not be reviewed when it appears that the defendant was not harmed.

"It is also urged on the authority of *Hudson v. Swan* (*supra*), and the cases therein cited, that the plaintiffs by alleging in their complaint and asserting at the trial absolute ownership of the property, and also a special interest in or lien upon it, waived their special interest or lien, if any they had, and cannot recover without establishing ownership. In the case cited the facts alleged by the plaintiff to establish ownership were inconsistent with those upon which he relied to establish a lien, which is not the fact in the case at bar. As has been shown, the plaintiffs' interest was more than that of mere lienors, and there being no dispute about the facts, the inconsistency relating wholly to the legal conclusions to be drawn from the agreed facts, the case cited is not controlling."

¹ *Stoveld v. Hughes*, 14 East, 308.

² *Pearson v. Dawson*, El., Bl. & El. 448, 96 Eng. Com. L. 447.

³ *Woodley v. Coventry*, 2 Hurl. & Colt. 164.

⁴ *Knights v. Wiffen*, L. R. 5 Q. B. 660, *Williston's Cases*, 95.

§ 1504. — **Form of delivery order or warrant as estoppel.**—The estoppel, as already intimated, may arise not only from the conduct of the seller, but also from the form or contents of the documents he may have issued to represent the goods. What documents shall operate to effect an estoppel is not entirely clear from the authorities. There would seem to be no question anywhere that mere certificates that goods are ready for delivery,¹ or informal orders for delivery not intended by the parties or usually understood to be representatives of the goods, are not such documents as will create an estoppel. *A fortiori* is this held to be so where the goods are not yet in existence or are unidentified or unseparated from a larger mass.²

¹Such was the form of the document in *Gunn v. Bolckow, Vaughan & Co.*, 10 Ch. 491, where it was contended that the certificates were warrants or delivery orders, but the court rejected the idea. "To say that," declared James, J., "is in truth to say a thing which cannot be. No custom of the trade can make a certificate a bill of exchange or a warrant."

In *Farmeloe v. Bain*, 1 Com. Pl. Div. 445, the defendants had contracted for the sale to Burrs & Co. of one hundred tons of zinc to be taken from a larger mass. They afterward gave to the buyer four documents in the following form: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Plaintiffs bought from the purchaser on the strength of these documents. It was admitted that they were not documents known among merchants, and therefore the court declared each was to be judged like any other ordinary written instrument. "So looking at it," said Brett, J., "it obviously contains no representation of any fact, and the

plaintiff had no right to rely upon it as such a representation." And Archibald, J., said: "It has been insisted on plaintiffs' part that those documents amount to a representation that the goods were the goods of Burrs & Co., free from any lien, and that therefore the defendants are estopped from setting up the right which every unpaid vendor has of withholding delivery of the goods. I agree with my brother Brett that we cannot look at the documents in question as amounting to any such estoppel. They clearly do not contain a representation of any fact which can be relied on as an estoppel." The goods here had not as yet been separated from the mass, and in this respect the case resembles, and was cited as authority for, the case of *Anderson v. Read*, 106 N. Y. 333, 13 N. E. R. 292, hereinafter referred to.

²Thus, in *Anderson v. Read*, 106 N. Y. 333, 13 N. E. R. 292, it is said: "The claim of plaintiffs' counsel that many of the American cases hold the doctrine that delivery orders transfer the title to the property the same as a bill of lading, even without acceptance, is not material here.

§ 1505. —. In a leading English case,¹ which has been often cited, the seller delivered to the buyer an order upon his agent with whom the goods were stored, saying, "You will please deliver to the order of" the buyer the goods in question.

No delivery order, nor any other document, can transfer the title to property not in existence, or unidentified and undistinguishable from a larger mass, not itself designated, and from which no appropriation has been made." In this case the facts were as follows: Defendants' firm entered into a contract with the firm of R. W. L. R. & Co., which stated that the former had "sold" to the latter a specified quantity of "ammoniated superphosphates" at a price specified, to be paid for "on delivery to buyers of bills of lading, by their notes." The vendors guaranteed the goods to be of a specified quality, the sampling and analysis to be made by certain persons named; shipments to be made during the

month of December, 1881. The purchasers had previously contracted to sell to one De L. a larger amount of the same general kind of fertilizer; he agreed to accept the goods purchased of the defendants to apply upon his contract. Defendants, with knowledge that R. & Co. had made such contract with De L., and desired the goods to make delivery under that contract, accepted an order drawn on and presented to them by R. & Co., requiring them to deliver the goods "sold to" R. & Co. to De L., and also delivered to R. & Co. a memorandum stating they would deliver to De L. on said order, on vessels to be furnished by him, the last delivery to be made the last of December or early in January, 1882.

¹McEwen v. Smith, 2 H. L. Cas. 309. Here S, the owner of sugars, sold them to B, to whom he gave a delivery order addressed to his agent A. and took a bill of exchange for the price. B sold the sugars to M, and transferred the delivery order to him. The sugars were in the warehouse of S, in whose books they were entered as received by him "from A on account of S." The sugars were weighed and invoiced by A upon the order of S. Neither B nor M took any steps to act on the delivery order till a rumor arose of B's insolvency, when M presented the order to A, and received from him a fresh order addressed to S, the warehouse keeper. Before the sugars could be actually delivered under this order, A removed them,

under the direction of S. *Held*, affirming the judgment of the court below, that the possession of the goods had never been changed, and that S might still enforce upon them his lien as vendor.

McEwen v. Smith, *supra*, was in 1889 cited and relied upon in Gillman v. Carbutt, 61 L. T. R. (N. S.) 281, where the order was in the form, "Deliver to the order of" the purchaser, but the order also contained this: "C. | 6—2—88," which referred to the contract between the original buyer and seller. There was held to be no basis for estoppel. "A delivery order," said the court, "is only a promise to do something *in futuro*, and is not a representation as to a state of facts."

This order was transferred upon a resale to the sub-purchaser, but before the possession had actually been changed the original buyer failed and the seller refused to deliver the goods to the sub-purchaser. It was urged in behalf of the latter that the seller was estopped from asserting his lien by reason of the order given, and that the delivery order was to be subjected to the same rules as a bill of lading; but the House of Lords repudiated this position, saying that it was one "for which no authority in the usage of trade or in the law can be shown."

§ 1506. —. In a later English case,¹ however, the document took the form of a "warrant" for iron, which recited that the iron would not be delivered to any one except the holder of the warrant, and declared that the iron was deliverable f. o. b. to the purchasers or to their assigns by indorse-

R. & Co. gave their notes as agreed for the purchase price. The goods were not in fact manufactured at this time. On receipt of the order and memorandum, De L. gave his own notes and the acceptances of third persons to R. & Co. in payment for the goods. R. & Co. soon after stopped payment, and made an assignment for the benefit of creditors. Defendants refused to deliver the goods under the order unless they were paid the purchase price, and offered to surrender the notes received by them. In an action upon the contract to recover the value of the goods, *held* (Ruger, C. J., and Andrews and Danforth, JJ., dissenting), that it was an executory, not an executed, contract, and so passed no title to the goods specified; that the subsequent transactions between the parties did not transform said contract into an executed one; that the delivery of the order to De L. vested no right of property in him, but simply amounted to an assignment to him of the rights of R. & Co.

under the contract, and inasmuch as against R. & Co. defendants had the right to refuse to deliver the goods without payment therefor, and after that firm became insolvent they had the same right as against De L. or his assignee.

Also held (Ruger, C. J., Andrews and Danforth, JJ., dissenting), that defendants were not estopped from showing the fact that no title passed, or from denying the legal right of plaintiff, as assignee of De L., to a delivery of goods of the same character and quality as described.

Also held (Ruger, C. J., Andrews and Danforth, JJ., dissenting), that the question was one of the law for the trial court, and that a submission thereof to the jury was error.

Kimberly v. Patchin (19 N. Y. 330); Briggs v. Sizer (30 id. 647); Knights v. Wiffen (L. R., 5 Q. B. 660), were distinguished.

¹ Merchants' Banking Co. v. Phoenix Bessemer Steel Co., L. R. 5 Ch. Div. 205.

ment thereon. There was also evidence that the form of this warrant had been settled by eminent counsel many years before for the very purpose of showing that the goods were free from the seller's lien, and that by the custom of the iron trade such warrants passed from hand to hand and were supposed to give a title to the goods free from any vendor's lien; and it was held that the seller was estopped, as against a sub-purchaser who had bought the iron in reliance upon the warrant and the custom, from setting up a lien.

§ 1507. — Warehouse receipts in the United States.—

In the United States, in pursuance of custom and the evident intention of the parties, warehouse receipts, like bills of lading, are usually regarded as representatives of the goods described in them,¹ and a transfer of the receipt to a sub-purchaser, who acts in good faith and in ignorance of the seller's claims, will have the same effect in divesting the lien as would result from an actual delivery of the goods themselves. As against such a purchaser, who has relied upon its representations, the statements in the receipt that the goods will be delivered to the holder of it operate an estoppel either as against the warehouseman who issued it where he is the seller,² or against a

¹ See *Commercial Bank v. Hurt*, 99 Ala. 130, 12 S. R. 568, 19 L. R. A. 701, 42 Am. St. R. 38, Willis. Cas. 595; *Burton v. Curryea*, 40 Ill. 320, 89 Am. Dec. 350; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. R. 408; *Davis v. Russell*, 52 Cal. 611, 28 Am. R. 647; *Solomon v. Bushnell*, 11 Oreg. 277, 3 Pac. R. 677, 50 Am. R. 475; *Durr v. Hervey*, 44 Ark. 301, 51 Am. R. 594; *Merchants' & M. Bank v. Hibbard*, 48 Mich. 118, 11 N. W. R. 834, 42 Am. R. 465; *Rice v. Cutler*, 17 Wis. 351, 84 Am. Dec. 747.

² *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, L. R. 5 Ch. Div. 205, where it is said of the sellers: "They issued with their first parcel of goods two documents: the one is

an invoice, the other a warrant. The invoice contains every element which is required to make it an ordinary document of title on which the purchaser could obtain the goods: 'Messrs. Gilead A. Smith & Co. Bought of the Phoenix Bessemer Steel Company, Limited, stacked in these works to your order, to be delivered f. o. b. at Liverpool according to your instructions;' and then follow the details of the steel rails. That is an ordinary document of title, an ordinary invoice sent by a vendor to a purchaser. But they gave to Gilead A. Smith & Co., at their request, at the same time, another document, the iron warrant, the thing which the trade want for

former holder of the receipt who would claim a lien against a purchaser from his vendee.¹

4. *Revival of Lien on Insolvency of Purchaser.*

§ 1508. Revival of lien — Insolvency of purchaser before actual delivery.— With the actual and unconditional delivery of the goods to the purchaser, the lien, as has been seen, is at

the purpose of either raising money by pledging or selling, and that is a totally different thing. It is treated in a totally different way. It begins with these words: 'The undermentioned rails will not be delivered to any party but the holder of this warrant.' Surely that means they will be delivered to the holder; it never means we will keep them and not deliver them to anybody, but sell them for our own benefit and deliver them to the purchaser. The very form of the warrant shows the purpose. In my opinion, considering that they had already given a document of title which was quite clear and independent and satisfactory to the purchaser, this was something they were issuing for a different purpose. It goes on, 'stacked,' etc.; in the same way, we had 'stacked' in the invoice; but the next words are, 'Warrant for these rails deliverable (f. o. b.) to Messrs. Gilead A. Smith & Co. of London, or to their assigns by indorsement hereon.' Does not that mean they are warrants for delivery, and is not the meaning of the thing itself on the face of it, although it may not destroy *per se*, standing alone, if it had been a single document of title, the vendor's lien, when you consider it is an additional document given at request, and that you must impute some purpose for giving two documents differing in form

at the same time, I say, is it rational to impute any other purpose than really the very purpose that it was given them for, namely, the purpose of pledging or selling, as I have no doubt it was? Therefore, I say, in this particular case I think the effect of the two documents and the mode of request is to show that it was really intended by the vendors, and that is special in this case."

¹ Thus in *Fourth National Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333, the seller had cotton in warehouse represented by warehouse receipts. He delivered these to his vendee conditionally, but the vendee wrongfully pledged them to an innocent party. Said the court: "The general rule, of course, is, that where the vendor surrenders to the vendee, or to the agents of the vendee, the possession of the subject-matter of the sale, whether by a manual and actual or by a symbolical delivery, the lien is defeated, provided that the vendor does entirely and voluntarily resign possession of the goods. But there are cases in which the vendor, as between vendor and vendee, may retain a lien which he will not be entitled to as against interests of third persons which may intervene. By delivering the warehouse receipts to the freight line, the vendor in the present case seems to have changed the control and do-

an end, and the goods cannot be regained although the purchaser was then or has since become insolvent. There are, however, many cases in which the seller has expressly or impliedly given his *consent* to a delivery, but in which no *actual* delivery as yet has taken place, and it becomes an important question to determine whether the seller may withdraw that consent and prevent an actual delivery until the goods are paid for.

§ 1509. — Where the seller, who has parted with his title, consents that the goods may be delivered without receiving payment for them or security for the price, he obviously relies upon the credit of the buyer, and the fact that the buyer is in good credit at the time he is to receive the goods is clearly the basis of the consent. If, then, before the consent has actually been consummated by a delivery, the seller discovers that the buyer is insolvent, the whole inducement to the consent is gone and the consent should be no longer operative.

§ 1510. — **Insolvency of buyer before expiration of credit.**—The case of a sale of goods upon a term of credit affords an excellent illustration of the rule. By giving credit for the price the seller manifests his willingness that the buyer may take the goods at once and pay for them at a subsequent time. He thus consents to waive and, if the consent is followed by an actual delivery, he does most unequivocally waive his lien. “But,” as was clearly stated by Chief Justice Shaw,¹ “the law, in holding that a vendor, who has thus given credit for the goods, waives his lien for the price, does so on one implied condition, which is that the vendee shall keep his credit

minion of the property, and he put it in the power of the vendee to do what he actually did, that is, to take the symbol of the property, which, so far as the rights of third persons are concerned, was the property itself, and to pledge it for value under such circumstances as would naturally lead the most vigilant to believe

that the property was his own to sell or pledge; we do not see, therefore, how it can be said that, as to third persons, such as the plaintiff in this case, the vendor retained his lien.”

¹In *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754, Adam's Cas. 7.

good." If, therefore, before the goods have actually been delivered, the buyer proves to be insolvent, the consent to deliver them without payment may be withdrawn, the lien revives, and the seller may hold the goods to secure the payment of the price.¹

§ 1511. — The fact that the goods have been measured, weighed, marked or set aside for the buyer, so that the *title* to them may have completely passed, is not material — the rule supposes that the title may have passed; but if possession of them has not actually been transferred — if they still remain in the custody of the seller or under his control,— he may refuse delivery until the price is paid.

§ 1512. — **Insolvency of buyer before delivery order complied with.**—The same results ensue where the consent has been given in the form of a delivery order either upon the seller himself or his warehouseman or bailee; it may be revoked upon discovery of the insolvency of the buyer before an actual delivery has taken place. The delivery order is, at most, but one form of constructive delivery, and, as is said in a recent case² in which the subject was elaborately considered, it is abundantly settled that, as between the vendor and the vendee, where the rights of subsequent purchasers from the vendee are not involved, the lien is not divested by any species of constructive delivery, so long as the vendor retains the actual custody of the goods, either by himself or by his servant or agent.

§ 1513. — Thus, where the seller is himself the warehouseman and delivers to the buyer a statement, certificate or delivery order showing that the seller now holds the goods as warehouseman for the buyer or transfers the goods upon his books to the name of the purchaser, still if before payment and actual delivery the buyer becomes insolvent, the lien of the vendor attaches and he may hold as against the assignees of the in-

¹ See *post*, § 1508 *et seq.*

² *Conrad v. Fisher*, 37 Mo. App. 353, 8 L. R. A. 147.

solvent purchaser.¹ Even though he may have charged the buyer with rent during the interval, his lien will still revive.²

§ 1514. — So where the seller is not himself the warehouseman, but the goods are in the custody of another as bailee or warehouseman for the seller, the delivery order, as between the seller and the buyer, has no greater effect, and if the buyer becomes insolvent before payment, and an actual change of possession by attornment or otherwise, the order to deliver may be revoked and the lien will not be lost.³ The fact that the warehouse is a government warehouse is immaterial.⁴

§ 1515. — Same subject—Taking note—Giving receipted bill, etc.—The revival of the lien is not affected by the fact that the seller has received conditional payment by promissory notes or bills of exchange, certainly where the paper remains in the hands of the seller without negotiation so that it may be delivered up in discharge of the lien,⁵ and even, it is said, where the paper has been negotiated and is outstanding at maturity, or matured and outstanding when the insolvency occurred, if the seller has indorsed it. The liability as indorser

¹ Bloxam v. Sanders, 4 B. & Cr. 941; Bloxam v. Morley, 4 B. & Cr. 951; Miles v. Gorton, 2 Cr. & Mees. 504; Townley v. Crump, 4 Ad. & El. 58; Valpy v. Oakeley, 16 Q. B. 941; Grice v. Richardson, 3 App. Cas. 319; Griffiths v. Perry, 1 El. & El. 680; Ex parte Chalmers, 8 Ch. App. 289; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. R. 348; Arnold v. Carpenter, 16 R. I. 560, 18 Atl. R. 174; McElwee v. Metropolitan Lumber Co., 69 Fed. R. 302, 37 U. S. App. 266, 16 C. C. A. 232.

² This was the fact in Miles v. Gorton, *supra*, but Bayley, J.,—distinguishing Hurry v. Mangles, 1 Camp. N. P. 452, a *nisi prius* decision of Lord Ellenborough—said, “I am of opinion that this fact makes no difference in the present case, and I

should have thought so if the warehouse rent had been actually paid.”

³ McEwan v. Smith, 2 H. L. Cas. 309; Griffiths v. Perry, 1 El. & El. 680; In re Batchelder, 2 Low. (U. S. Dis. Ct.) 245; Keeler v. Goodwin, 111 Mass. 490, Willis. Cas. 116; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Thompson v. Baltimore, etc. R. Co., 28 Md. 396.

⁴ Conrad v. Fisher, *supra*.

⁵ Milliken v. Warren, 57 Me. 46 [citing Parks v. Hall, 2 Pick. (Mass.) 211; Arnold v. Delano, 4 Cush. (Mass.) 41, 50 Am. Dec. 754]; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. R. 348 [citing, *inter alia*, Haskell v. Rice, 11 Gray (Mass.), 240; Bloxam v. Sanders, 4 B. & Cress. 941; Clark v. Draper, 19 N. H. 419; Hamburger v. Rodman, 9 Daly (N. Y.), 93].

in such a case operates to continue the relation of the seller as an unpaid vendor.¹

§ 1516. — Neither is the revival of the lien affected by the fact that the seller, upon the receipt of a bill or note as conditional payment, has given to the buyer a receipted bill or other similar document.²

§ 1517. — If, after the revival of the seller's lien by expiration of the credit, the seller extends further time by taking renewal notes payable at a future date, the revived lien will be waived, unless there was some agreement that this further credit should not have that effect, and that the seller should hold the property as security for the renewal notes.³

§ 1518. — **Same subject — Instalment delivery — Subsequent appropriation.**— The revival of the lien, moreover, is not affected by the fact that the contract was for the sale of goods to be delivered by instalments,⁴ or of an article to be subsequently appropriated to the contract,⁵ instead of a single contract for a specific chattel.

¹ *McElwee v. Metropolitan Lumber Co.*, 69 Fed. R. 302, 37 U. S. App. 266, 16 C. C. A. 232 [citing *Benj. Sales* (Corbin's ed.), §§ 1130-1185, note 4; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 El. & El. 680; *Grice v. Richardson*, 3 App. Cas. 319; *White v. Welsh*, 38 Pa. St. 420; *Wanamaker v. Yerkes*, 70 Pa. St. 443; *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; *Townley v. Crump*, 4 Ad. & El. 58]. "The right of retention," said the court, "is not a right of rescission, and it is not essential to the revival of the lien that the notes of the purchaser shall be delivered up or ready for delivery, though in *Arnold v. Delano*, cited above, it seems to have been so regarded."

² *Arnold v. Carpenter*, 16 R. I. 560, 18 Atl. R. 174 (citing *Keeler v. Goodwin*, 111 Mass. 490; *Solomons v. Chesley*, 58 N. H. 238; *Voorhis v. Olmstead*, 66 N. Y. 113; *Southwestern Freight, etc. Co. v. Stanard*, 44 Mo. 81, 100 Am. Dec. 255; *McEwan v. Smith*, 2 H. L. Cas. 309; *Griffiths v. Perry*, 1 El. & El. 680).

³ *McElwee v. Metropolitan Lumber Co.*, *supra*.

⁴ *Griffiths v. Perry*, 1 El. & El. 680; *Ex parte Chalmers*, 8 Ch. 289.

⁵ *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. R. 1113, where by the contract the buyer had his choice of three styles of pianos. By the time he made his selection he was insolvent, and the seller's lien was held to attach.

§ 1519. — **What constitutes insolvency.**—The term “insolvency” is not used in any technical sense, and it has substantially the same meaning here that it has in the analogous case, hereafter to be considered,¹ of stoppage *in transitu*. It means a general inability to pay one’s debts or to meet one’s financial obligations. It is not necessary that the buyer shall have made an assignment for his creditors or have been adjudged a bankrupt.² “Permitting commercial paper,” said the court in one case, “to be dishonored by one engaged in commerce, and his property to be attached in an action in which judgment is subsequently recovered by default, is evidence, and, if unexplained, is proof of insolvency.”³

§ 1520. —. “The right is not limited,” it is further declared in a late case,⁴ “to cases where the insolvency of the vendee occurred after the date of the contract, but exists also even where the insolvency existed at that time but was not discovered by the vendor until afterwards; and, as the presumption of both reason and law is that, where a vendor sold goods on credit, he believed that the purchaser was solvent and able to pay, the burden is on the vendee to prove that the vendor had knowledge of the insolvency, and entered into the contract with that knowledge.”

5. *Revival of Lien on Expiration of Credit.*

§ 1521. **Lien revives on expiration of credit.**—The lien also revives although the buyer does not become insolvent where the goods are sold on credit but are permitted to remain in the possession of the seller until the term of credit has expired. The buyer cannot thereafter demand delivery without a payment or tender of the price.⁵

¹ See *post*, § 1539.

² *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. R. 1113; *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. R. 348.

Formal and decreed insolvency is, of course, enough. *Arnold v. Delano*, 4 Cush. (Mass.) 33, 50 Am. Dec. 754, *Adam’s Cas.* 7.

³ *Tuthill v. Skidmore*, *supra*.

⁴ *Crummey v. Raudenbush*, *supra*.

⁵ *Benjamin on Sale* (6th Am. ed.), § 825; *McElwee v. Lumber Co.*, 69 Fed. R. 302, 37 U. S. App. 266, 16 C. A. 232; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. R. 899.

6. *Effect of Tender of Price.*

§ 1522. **Lien lost by tender of price.**—The seller's lien being a right given him by law to secure the payment of the price, it is clear that, like other liens, it is destroyed by a tender of the price, even though the seller refuses to accept it.¹

7. *Effect of Claiming Lien.*

§ 1523. **Claim of lien does not rescind sale.**—The assertion of a lien by the seller is in pursuance of the contract and not in rescission of it.² The title does not revert in the seller, but remains in the buyer until in some way his right is foreclosed. The seller may therefore proceed to recover the price if he so elects, being ready to deliver upon payment;³ he may foreclose the buyer's right by a resale,⁴ or, according to some authorities, he may elect to treat the contract as rescinded.⁵ Until the right has been foreclosed, however, the buyer's title remains, and he may obtain the goods or defeat the lien by payment or tender of the price.

II.

THE SELLER'S RIGHT OF STOPPAGE IN TRANSITU.

§ 1524. **What here included.**—In dealing with the question of the seller's right to stop the goods in transit, it may be helpful to distribute the matter under the following heads:

1. The general nature of the right.
2. Who may stop the goods.
3. Against whom stoppage may be effected.
4. Under what conditions stoppage may be effected.
5. How stoppage may be effected.
6. Effect of stopping the goods.

¹ *Martindale v. Smith*, 1 Q. B. 389. low, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Babcock v. Bonnell*, 80 N. Y. 244. See also *Cory v. Barnes*, 63 Vt. 456, 21 Atl. R. 384.

³ See *post*, § 1667, *et seq.*

² *Arnold v. Delano*, 4 Cush. (Mass.) 4 See *post*, § 1621.

33, 50 Am. Dec. 754; *Rowley v. Bige-* ⁵ See *post*, § 1631.

1. *The General Nature of the Right.*

§ 1525. **The origin and nature of the right.**—Conceding that, as has been seen in the preceding sections, the seller of goods while yet in his possession has a lien upon them to secure the payment of the price, and, moreover, that even though he may have done those things which under ordinary circumstances would amount to a waiver of his lien, that lien will yet revive if the buyer be found insolvent before the goods have actually been delivered by the seller, the question now remains whether the seller's right can be pushed still further so that it may be exercised against the goods if the buyer be found insolvent after the goods have left the actual possession of the seller and are in the hands of a carrier for transportation to the buyer, but before the latter has in fact received them? That such a right may be exercised is now unquestionably conceded, and the name that has been given to it is the familiar one of stoppage *in transitu*.

§ 1526. —. What was the precise nature and origin of the right was, in times past, the subject of some uncertainty and doubt; but it seems now to be generally conceded, notwithstanding Lord Campbell's assertion¹ that the doctrine of stoppage *in transitu* had no more relation to the seller's lien than the doctrine of contingent remainders, that the right of stoppage is merely an extension of the seller's lien. It is moreover, clearly now a legal remedy, though undoubtedly of equitable origin.² "The right to stop goods *in transitu*," said Chief Jus-

¹ In *McEwen v. Smith*, 2 H. L. Cas. 309.

² In *Gibson v. Carruthers*, 8 M. & W. 321, 338, Lord Abinger, C. B., said: "Although the question of stoppage *in transitu* has been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner.

"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much a practice to call it a principle of equity, which the common law has adopted. This was strongly insisted upon by Mr. Justice Buller, in his celebrated judgment in the House of Lords, in the case of *Lickbarrow v. Mason*, 4 Bro. P. C. 57. It has also been said by Lord Kenyon that it was a prin-

tice Peyton, "though first introduced and founded in equity, has long been considered and acted upon as a legal remedy. The courts of law, admitting the justice of the right, have recognized it in constant practice and extended a liberal aid in

ciple of equity adopted by the common law to answer the purposes of justice. The most eminent equity lawyers that I have had the opportunity of conversing with in times that are gone by were unanimous in repudiating it as the offspring of a court of equity. The first case that occurred upon this subject affords some authority for the opinion of Mr. Justice Buller and Lord Kenyon. It is the case of *Wiseman v. Vanderput*, 2 Vern. 203, in 1690. That was a bill filed by the assignees of a bankrupt against the vendor. The lord chancellor directed an action of trover to be brought by the plaintiffs, upon which they recovered a verdict. It is clear, therefore, that the rule had not at that time been adopted at law. The lord chancellor, however, adopted it in equity, and, notwithstanding the verdict at law for the plaintiffs, made a decree against them. The next case is that of *Snee v. Prescott*, 1 Atk. 245. Lord Hardwicke again applied the rule to a certain extent in equity. But it is remarkable that he received evidence of what was the custom of merchants on this point; and he expressly founds his decree upon the evidence of the custom of merchants, as well as upon the justice of the case. This decision occurred about the year of 1742 or 1743. The next case is that of *Ex parte Wilkinson*, in 1755, referred to in *D'Aquila v. Lambert*, Ambler, 399, which took place in 1761. There the lord chancellor again grounded his decree on the usage of merchants,

and stated that the several previous decisions which had taken place to the same effect had given great satisfaction to the merchants. Numerous cases have followed at law, showing that the right of stoppage *in transitu*, under certain circumstances, is now part of common law.

"Nevertheless, owing perhaps to the doubtful state of its parentage, many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between the vendor and vendee. It is to be observed, however, that the right of stoppage *in transitu* is not peculiar to the law of England. It existed, I believe, in the commercial States of Europe. The cases I have already referred to show that it was practiced in the Italian States. That it existed in Holland was proved in a case tried by Lord Loughborough, and mentioned by him in his judgment in the case of *Lickbarrow v. Mason*, 1 H. Bl. 357. That it is the law of Russia was also proved in the cases of *Inglis v. Usherwood*, 1 East, 515, and of *Bohtlingk v. Inglis*, 3 East, 381. It appears also, on reference to the *Chapitre de la Faillité*, in the *Code Napoleon*, that the law of France on this subject is in all points similar to our own. It is known that this celebrated code is chiefly a digest of the law of France as it existed before the Revolution. Indeed the right of stopping *in transitu* had, before the composition or digest of

enabling an unpaid consignor or vendor to regain possession of property on its way to a vendee, who, from his circumstances, may not be in a condition to fulfill the terms of his contract. What was formerly a mere equitable claim is now, therefore, a legal possessory right. This right is nothing more than an extension of the lien which the vendor has on all sales for the price until after the delivery, to the very point of the goods coming to the actual custody of the vendee or his agent."¹

The right, however, still retains so much of its equitable nature that it may be enforced by bill in equity in a proper case.²

that code, acquired the name in the French law of 'Revendication.' It may therefore be presumed to be a part of the law of merchants which prevails generally on the continent. The proof of which, from time to time, combined with its manifest justice and utility, has at length introduced it into the common law of England, of which the law merchant properly understood has always been reckoned to form a part."

¹ In *Morris v. Shryock*, 50 Miss. 590. So in *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489, Weston, C. J., said: "The right of stoppage *in transitu* upon the insolvency of the purchaser has been well settled in the commercial world. It had its origin in the civil law; was first recognized in England in equity, and was subsequently adopted by the courts of common law. It is analogous to the common-law right of lien, being an equitable lien which enables the vendor, after he has parted with his possession, to resume it at any time before the vendee has acquired it, and to retain the goods until the price has been paid or tendered." See also *Johnson v. Eveleth* (1899), 93 Me. 306, 45 Atl. R. 35.

² *Schotsmans v. Railway Co.* (1867), 2 Ch. App. Cas. 332. In this case

Cairns, L. J., said: "The case of the plaintiff Schotsman, as I understand it, may thus be stated. He says he had sold goods, thereby transferring the property at law to Cunliffe; that by a stoppage *in transitu*, alleged to be effectual, he has revested in himself the legal title to these goods, but that he holds this title merely as security for the price of the goods, and liable to be called on to surrender it on payment of the price; that he is therefore an incumbrancer only, or a person having what Lord Kenyon, in *Hodgson v. Loy*, 7 T. R. 440, described as a kind of equitable lien for the price of the goods, which lien or incumbrance he is entitled to realize, the account of what is due being at the same time taken; that the goods are in the meantime in the possession of one of the defendants, who is a stockholder or agent holding them merely for the person who is owner, subject to that lien, and that the goods require the protection of an injunction. I should be prepared to hold this to be a case entirely within the province of this court, and depending on the ordinary principles which regulate in equity the relations of mortgagor and mortgagee, whether of real or personal property, although, for obvious reasons, cases

§ 1527. **Exists only when title has passed.**—The right of stoppage *in transitu*, strictly so called, presupposes, and can be exercised only in the event, that the title to the goods has passed to the buyer. It is of course true, as will be more fully noticed further on,¹ that the vendor who has forwarded goods under executory contract may stop or recall them in case of the buyer's insolvency or for other reason, but this is not strictly to be considered as an exercise of the right in question.²

§ 1528. **Right favored in the law.**—The right of stoppage *in transitu* is one of great justice, resting, it is said, upon the substantial reason that one man's property shall not be taken to satisfy another man's debts.³ It is therefore often declared to be a right highly favored in law. As stated in one case,⁴ it is "regarded with so much favor that the rule governing it will not be subjected to restrictions less liberal than those of immemorial prescription."

2. Who May Stop the Goods.

§ 1529. **Right may be exercised only by vendor or one in his position.**—The right of stoppage *in transitu*, being an extension of the seller's lien, and like that, as said by Bayley, J., a right "growing out of his original ownership," it is well set-

of this kind are more generally and more conveniently brought into a court of law." Lord Chelmsford, L. C., also said: "I entertain no doubt of the plaintiff's claim being the proper subject of a bill in equity."

¹See *post*, § 1614, subd. III.

²Thus in *Fraser v. Witt*, L. R. 7 Eq. Cas. 64, Lord Romilly, M. R., said: "In these cases the goods are always the property of the purchaser; if they were not, the question would not arise, because, of course, the vendor or any other person may always take possession of his own property; but the doctrine of stoppage *in transitu* is that a vendor

may stop the goods which he has sold to, and which have become the property of, the purchaser, at any time before they have got into his possession, if he has become insolvent." To same effect, per Willis, J., in *Bolton v. Railway Co.*, L. R. 1 Com. Pl. 439.

³In *D'Aquila v. Lambert*, 1 Amb. 399, Willis. Cas. 358.

⁴*Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. R. 63. See also *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Inslee v. Lane*, 57 N. H. 454; *Cabeen v. Campbell*, 30 Pa. St. 254; *Jones on Liens*, § 857.

tled that it can be exercised only by the seller of the goods or by one so far standing in the attitude of a seller as to be entitled to substantially the same protection. It is a right existing in virtue of original *ownership* or its equivalent, and does not avail one who at most had no ownership but a mere *lien*.¹

§ 1530. By factor who has bought goods for principal.—On the ground that he stands in the attitude of a seller, a factor who has purchased goods for his principal may exercise the right. Thus, where a factor had purchased for his principal, since deceased, a cargo of molasses, the court in a leading case² said: “The circumstance of his having purchased the molasses specially for this purpose can make no difference. It was paid for out of his own funds; and he stood in relation to the intestate in the character of a vendor, as much as if it had been supplied from his own warehouse. And it has been directly adjudged that a factor or agent who purchases goods for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor as to be entitled to stop the goods.³ Every reason upon which this right is founded applies with equal force to a purchaser so circumstanced.”

§ 1531. By person who pays price for vendee.—So it is held that the right of stoppage may be exercised by a person who pays the price of the goods for the vendee and takes from the latter an assignment of the bill of lading as security for his advances. “To that extent,” said the court, “he is a *quasi* vendor, entitled to use all lawful means in preventing his property or interests being sacrificed toward the payment of another person’s debts.”⁴

¹ One who has a mere lien on goods having surrendered them to a carrier and parted with his possession cannot regain his possession or revive his lien by stoppage *in transitu*. Sweet v. Pym, 1 East, 4.

² Mechem on Agency, § 687; Newhall v. Vargas (1836), 13 Me. 93, 29 Am. Dec. 489.

³ Citing Feise v. Wray, 3 East, 93. To same effect: Seymour v. Newton, 105 Mass. 272. See also D’Aquila v. Lambert, 1 Amb. 399; Tucker v. Humphrey, 4 Bing. 516; Hawkes v. Dunn, 1 Cromp. & Jer. 519; Oakford v. Drake, 2 Fost. & Fin. 493.

⁴ Gossler v. Schepeler (1875), 5 Daly (N. Y. Com. Pl.), 476, cited in note to

§ 1532. **But not by vendor of seller.**— But where goods are ordered of B by C, and B, instead of supplying them himself, orders them shipped on his account by A, who ships them to C but charges them to B, it is held that A, upon B's insolvency, cannot stop and hold the goods as against B.¹ The right of stoppage, said the court, can only be exercised "upon the transit of the goods from a vendor to the purchaser from *him*." C bought the goods of B and not from A. A was C's vendor, and to A only was C liable.

§ 1533. **Nor by unpaid agent of seller.**— So where goods are sold and paid for, but part are in the hands of seller's agents, who ship them in the seller's name to the buyer, and draw on the seller for a balance due by him to them, the agents may not, on the dishonor of their draft, stop the goods as against the purchaser. The agents may have had a lien as against their principal, but they surrendered that by delivering the goods to the carrier consigned to the buyer, and the agents stand in no such relation of vendor to him as will confer upon them the right of stoppage for non-payment by their principal.²

§ 1534. **Principal who has consigned goods to factor may stop.**— A principal, however, who has consigned goods to a factor may stop them in transit, on the insolvency of the latter, even though the factor may have made advances to the

Rucker v. Donovan, 19 Am. R. 87, where this question is fully discussed.

¹ Memphis, etc. R. Co. v. Freed (1882), 38 Ark. 614. Feise v. Wray, *supra*, was relied upon. So where goods are sold to one person, who, before delivery to him, resells them to another, and this is known to the original vendor, who consigns them to the second purchaser, the original vendor will have no right of stoppage *in transitu*. Eaton v. Cook, 32 Vt. 58.

² Mechem on Agency, § 687; Gwyn v. Richmond & Danville R. R. Co. (1881), 85 N. C. 429, 39 Am. R. 708. So an agent who has purchased goods for his principal, and consigned them to him, has no right of stoppage or of changing the destination or the consignee, as against his principal. Lake Shore, etc. Ry. Co. v. National Live Stock Bank (1899), 178 Ill. 506, 53 N. E. R. 326.

principal on the credit of the consignment,¹ or have a joint interest with the consignor.²

§ 1535. Surety for the buyer may not stop the goods.—A mere surety for the buyer, on the other hand, cannot, it was held in an English case,³ exercise the right of stoppage, but a surety who has paid the price may now, by virtue of the Mercantile Law Amendment Act, stop the goods on the insolvency of the buyer.⁴

§ 1536. Seller of executory interest may exercise the right. So one who has an executory interest by the purchase of goods not yet identified or separated, and who sells that interest to another, may exercise the right of stoppage against the latter if he is found to be insolvent. Thus in the leading case⁵ upon this subject the court said: "It was objected that it is only the owner of the goods who can exercise the right; and that, in this case, the property had not vested in the plaintiff at the time of the stoppage, but only an interest in and right to receive a certain portion of the cargo to be afterwards ascertained and appropriated to the parties intended; but we see no sound distinction, with reference to the right of stoppage *in transitu*, between the sale of goods, the property of which is in the vendor, and the sale of an interest which he has in a contract for the delivery of goods to him."

§ 1537. Stoppage by agent for his principal — Ratification.—The right of stopping the goods in transit may be exercised not only by the seller in person, but it may also be exercised by his agent. An express authority to the agent to stop the goods will of course suffice; but an express authority is not indispensable. The authority may be implied from words or conduct, or may be found to be embraced within the scope

¹ Benjamin on Sale (6th Am. ed.), § 833; *Kinloch v. Craig*, 3 T. R. 119.

² Benjamin, *ubi supra*; *Newsome v. Thornton*, 6 East, 17.

³ *Siffken v. Wray*, 6 East, 371.

⁴ Benjamin on Sale (6th Am. ed.), § 831. See *Imperial Bank v. Dock Co.*, 5 Ch. Div. 195.

⁵ *Jenkyns v. Usborne*, 7 Mann. & Gr. 678, 8 Scott, N. R. 505.

of a broader general authority to act in the interest of the seller.¹ And even though the authority had not been conferred in any way at the time the stoppage was effected, authority to that effect subsequently conferred will amount to a ratification of the act,² at least where ratification is effected before the goods have come into the possession of the buyer, or before it is otherwise too late for the seller in person to exercise the right.³

3. *Against Whom Stoppage May be Effected.*

§ 1538. *Against buyer or one standing in his attitude.*—

The right of stoppage being, as has been seen, one exercisable only by a seller or one standing in his position, it is also true,

¹Mechem's Hutchinson on Carriers, § 411. In *Reynolds v. Boston & Maine R. Co.*, 43 N. H. 580, it is said: "It is contended that the attempt to stop the goods was made without authority. Though goods cannot be stopped in transit by a stranger, absolutely without authority, and the act of such a mere stranger cannot be made valid by a ratification on the part of the vendor or his agents, subsequently to the time when the goods reach the hands of the vendee (*Bird v. Brown*, 4 Exch. 786), yet we regard it as settled that any agent who has power to act for the consignor, either generally or for the purposes of the consignment in question, may stop goods *in transitu* without any authority specially directed to that end, or empowering him to adopt that particular measure." See also *Bell v. Moss*, 5 Whart. (Pa.) 189; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Whitehead v. Anderson*, 9 M. & W. 518; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

²See Mechem on Agency, § 142. Ratification before the goods have reached the possession of the buyer

is sufficient. *Jones on Liens*, § 876; *Durgy Cement Co. v. O'Brien*, 123 Mass. 12, distinguishing *Bird v. Brown*, 4 Exch. 786.

A letter authorizing the stoppage, mailed before but not received until after the stoppage, is a sufficient ratification of the act. *Hutchings v. Nunes*, 1 Moore's P. C. (N. S.) 243; *Whitehead v. Anderson*, 9 M. & W. 518.

³See Mechem on Agency, § 168. In *Bird v. Brown*, 4 Exch. 786, it is held that ratification comes too late if it is effected at a time when the seller in person could not then stop the goods, *e. g.*, when they have come into the possession of the buyer.

Bird v. Brown was also distinguished in *Bolton Partners v. Lambert*, 41 Ch. Div. 295, Mechem's Cases on Agency, 222, for this reason: "There it was held that the ratification could not operate to divest the ownership which had previously vested in the purchaser by the delivery of the goods before the ratification of the alleged *stoppage in transitu*."

and for like reasons, that the right avails only against the buyer or one standing in his attitude. The case presupposes that the goods have been sold and the title passed. The seller does not assert this right against his own goods. He may, of course, stop in transit goods of his own transported under a variety of circumstances, as, for example, where he intercepts his goods on their way to be appropriated under an executory contract; but the right of stoppage in transit, in the strict legal meaning of that phrase as now under consideration, is something radically different. So it is radically different from the attempt of a defrauded seller to rescind the sale for the buyer's fraud or misrepresentation, as such an act is designed to put an end to the relation of buyer and seller, while stoppage *in transitu* is based upon the continuance of that relation.

§ 1539. Only against an insolvent buyer.—The right of stoppage in transit can be exercised only against an insolvent or bankrupt buyer.¹ The term “insolvency,” however, is not here used in any technical or restricted sense, but means a general inability to pay one's debts.² Actual insolvency of the buyer, as distinguished from apparent insolvency, is not essential. “It is sufficient,” said the court in Ohio,³ “if, before the stoppage *in transitu*, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency.”

§ 1540. — Evidence of insolvency.—What shall be deemed sufficient evidence of insolvency cannot be determined by any hard-and-fast rule. The circumstances of each case must be considered. “Strict proof of insolvency,” said the court in

¹ Mechem's Hutchinson on Carriers, § 413; Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 S. R. 175, 54 Am. St. R. 114; Smith v. Barker, 102 Ala. 679, 15 S. R. 340; Loeb v. Peters, 63 Ala. 243, 35 Am. R. 17; More v. Lott, 13 Nev. 376.

Umbenhauer, *supra*, “which holds that stoppage *in transitu* may be asserted against a solvent debtor.”

² Durgy Cement, etc. Co. v. O'Brien, 123 Mass. 12.

³ Diem v. Koblitz, 49 Ohio St. 41, 34 Am. St. R. 531, 29 N. E. R. 1124, Willis.

“We know of no authority,” said Cas. 426.
the court in Bayonne Knife Co. v.

Wisconsin,¹ "is not required." "It is not necessary to prove that he is not able to pay a cent, or any particular sum, but it is sufficient to show that he is unable to pay his debts."² "Of this inability, the failure to pay one just and admitted debt would possibly be sufficient evidence."³ "It is not necessary

¹ *Jeffris v. Fitchburg R. R. Co.*, 93 Wis. 250, 67 N. W. R. 424, 57 Am. St. R. 919, 33 L. R. A. 351.

² *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261.

³ Benjamin on Sales (6th Am. ed.), § 837; *Jeffris v. Railroad Co.*, *supra*.

A general inability to pay one's debts, evidenced by a stoppage of payment, is meant. *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Inslee v. Lane*, 57 N. H. 454; *Jeffris v. Fitchburg R. R. Co.*, *supra*.

Technical insolvency is not necessary; a stoppage of payment is sufficient. *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284.

A trader is insolvent, within the meaning of insolvency acts, when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do [*Buchanan v. Smith*, 83 U. S. (16 Wall.) 277, 308; *Bayly v. Schofield*, 1 M. & Sel. 338; *Shone v. Lucas*, 3 Dowl. & Ry. 218; *Wager v. Hall*, 83 U. S. (16 Wall.) 584, 599 (citing *Vennard v. McConnell*, 11 Allen, 562; *Thompson v. Thompson*, 4 Cush. 127; *Barnard v. Crosby*, 6 Allen, 327); *Dutcher v. Wright*, 94 U. S. 553, 557], though his inability be not so great as to compel him to stop business, and although he may be able to pay all his debts at a future time upon the winding up of his concerns. *Wager v. Hall*, *supra*.

"The purchaser may not have actually failed,—not have gone to protest, yet it might be clear that he was

hopelessly insolvent, and would be totally unable to pay when the debt fell due." *Bloomington v. Memphis, etc. R. Co.*, 6 Lea (Tenn.), 616. See also *Bowersox's Appeal*, 100 Pa. St. 434; *Daniels v. Palmer*, 35 Minn. 347. *Rogers v. Thomas*, 20 Conn. 53 (see also *Millard v. Webster*, 54 Conn. 415), holding some overt act indispensable, has been generally disapproved. See *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Benedict v. Schaettle*, 12 Ohio St. 515, *Adam's Cases*, 51; *Hays v. Mouille*, 14 Pa. St. 48.

In *Bloomington v. Memphis, etc. R. Co.*, *supra*, it is suggested that less evidence of insolvency is required in an action against the carrier alone where he only defends and the buyer does not contest the right.

In *Secomb v. Nutt*, *supra*, the court say "it is sufficient to show, with reasonable certainty, that is, with probability, that the vendee is embarrassed and not able to make full or general payment of his debts. And it would seem that the vendee's own admission of the fact to his vendor would be sufficient to authorize the latter to act upon it, and should, unless disproved, sustain his claim to stop the goods *in transitu*."

In *Bayonne Knife Co. v. Umbenhauer*, *supra*, it is held that the mere fact that a branch business of the buyer, for which the goods were bought, may have failed of success, does not render him insolvent if he has at other places property enough to pay all of his debts.

that the buyer should have been declared a bankrupt or insolvent by a judicial tribunal, or shown to be so by legal proceedings, or that he should have made an assignment of his property, or the like,—insolvency, in a case like this, fairly means that the party shall be shown to have been unable to meet the debt due the seller, at the time of the exercise of the right, when that debt should fall due; and if this fact satisfactorily appears, no matter how proven, the law requires no more.”¹

§ 1541. — **Absconding, attachment, etc., not enough.**—Insolvency must nevertheless be shown, and not merely that the debtor has absconded,² or has been sued, or that his goods have been attached.³ *A fortiori* is it not enough that for some other reason the seller desires that the sale shall be defeated. As said by Lord Romilly, “The insolvency of the purchaser is essential; the vendor cannot stop the goods because he has changed his mind.”⁴

§ 1542. — **Insolvent when.**—It has been held in Connecticut⁵ that it is essential to the exercise of this right that the insolvency shall have occurred after the sale and before the attempted stoppage; but this view has not elsewhere prevailed, and it is abundantly settled that it is sufficient if the insolvency is first discovered after the sale, though it may have existed before that time.⁶ Of course if the seller knew of the insolvency at the time of the sale, he cannot afterwards stop the goods for this reason.⁷

¹ *Bloomington v. Railroad Co.*, 6 Lea (Tenn.), 616.

² *Smith v. Barker*, 102 Ala. 679, 15 S. R. 340.

³ *Gustine v. Phillips*, 38 Mich. 674. *A fortiori* is it no evidence of the insolvency of the firm of which defendant was a member.

⁴ In *Fraser v. Witt*, L. R. 7 Eq. Cas. 64, citing *Wilmshurst v. Bowker*, 7 Man. & Gr. 882.

⁵ *Rogers v. Thomas*, 20 Conn. 53.

⁶ *Mechem's Hutchinson on Carriers*,

§ 413; *Kingman v. Denison*, 84 Mich. 608, 48 N. W. R. 26, 11 L. R. A. 347, 22 Am. St. R. 711 (citing *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Reynolds v. Boston, etc. R. Co.*, 43 N. H. 580; *Blum v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725; *Benedict v. Schaettle*, 12 Ohio St. 515, *Adam's Cas.* 51); *Walsh v. Blakely*, 6 Mont. 194; *Farrell v. Richmond, etc. R. Co.*, 102 N. C. 390.

⁷ *Fenckhausen v. Fellows*, 20 Nev.

312, 21 Pac. R. 886, 4 L. R. A. 732 [citing 1296

§ 1543. —. It seems, however, indispensable that the insolvency shall have happened at the time the goods are stopped, or at least at the time they arrive at their destination, and that it is not sufficient if it was then pending but did not happen until later. On this point, the language of Lord Stowell, in an analogous case,¹ has been approved:² “If the person to whom the goods are consigned is not insolvent; if, from misinformation or from excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that may have been incurred. . . . It is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution.”

§ 1544. —. It is evident, nevertheless, that in those cases in which the question of insolvency is to be determined from the circumstances, the point at which that condition is reached must be very difficult to define; and that, in many cases, subsequent developments must be material as aiding to determine the character of the previous events.

4. *Under What Conditions Stoppage May be Effected.*

§ 1545. **Goods can be stopped only while in transit.**—The right of stoppage *in transitu*, as its name implies, is one to be exercised only while the goods are on their way to be delivered to the buyer. They must clearly, therefore, be in transit, and in the hands of some third person—some middleman between the seller and the buyer—for the purpose of trans-

Blum v. Marks, *supra*; Buckley v. Furniss, 15 Wend. (N. Y.) 137; 2 Redf. Railways, 160; O'Brien v. Norris, *supra*; Parsons, Merc. Law, 61].

²Wilmshurst v. Bowker, 2 Man. & Gr. 792, 7 id. 882, Willis. Cas. 218; Benedict v. Schaettle, 12 Ohio St. 515, Adam's Cases, 51.

¹The Constantia, 3 Eng. Adm. 6 Rob. 321.

portation; for, if their transit has not begun, the seller has no occasion to stop the goods, and if it has ended he has no opportunity,—if the goods are still in the seller's hands he has no need to stop them, and if they have reached the hands of the buyer, the seller's right to control them has ceased. As stated by Lord Chelmsford:¹ "It is of the essence of the doctrine of stoppage *in transitu* that during the *transitus* the goods should be in the custody of some third person intermediate between the seller who has parted with and the buyer who has not yet acquired actual possession."

§ 1546. —. It is not material, in the language of Denio, J., whether this middleman "be a carrier, a warehousekeeper, a wharfinger, packer or other depositary, or an agent for the purpose of forwarding, nor by which of the parties to the sale he was employed. He may be the agent of the purchaser, designated, paid and employed by him; yet if the purpose of his employment is to expedite the property towards its destination, or to aid those engaged in forwarding it, the seller's right to stay the final delivery continues. But, however clearly the general principle may be stated, the circumstances of commercial dealings are so various that cases are apt to arise in which its application is a matter of extreme difficulty."²

§ 1547. **Existence of a transit — Goods transported on ship or other vehicle owned or chartered by purchaser.**—As a consequence of this doctrine that a middleman must intervene, arises the question, somewhat controverted, of the effect of a delivery of the goods upon a ship or other vehicle owned or chartered by the buyer for transportation to him.

There can be no doubt, as a general proposition, that if the buyer sends his own cart or servant for the goods, and thus obtains them, there is no middleman here intervening, there is no *transitus*, and hence no right of stoppage, unless by contract or special circumstances the seller has reserved a claim upon the goods.³

¹ In *Schotsmans v. Lancashire Ry. Co.*, L. R. 2 Ch. App. 332.

² *Harris v. Pratt*, 17 N. Y. 249.

³ "Of course there is no further

§ 1548. — **Shipment on vessel owned by buyer.**—Where the goods are shipped on board a vessel owned by the vendee, some American cases¹ make a distinction based upon the destination of the goods, holding that “if they are to be transported not to his residence or to be received by him, but to other markets, there is a termination of the transit and the right of stoppage by the vendor ceases;” but “if they are put on board the consignee’s ship to be transported to him, the transit con-

transitus after the goods are in the purchaser’s own cart. There they are at home, in the hands of the purchaser, and there is an end of the whole delivery.” *Berndtson v. Strang*, L. R. 4 Eq. 481, *Willis. Cas.* 394. See also *Van Casteel v. Booker*, 2 Exch. 691; *Merchants’ Banking Co. v. Phoenix Bessemer Steel Co.*, 5 Ch. Div. 205; *Ogle v. Atkinson*, 5 Taunt. 759, *Willis. Cas.* 215.

¹*Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489 (from which the quotations in the text are made); *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63; *Ilsley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

In *Newhall v. Vargas*, *supra*, the court considers the question with much fullness, and after citing *Fowler v. McTaggart*, 1 East, 522; *Inglis v. Usherwood*, 1 East, 515, and *Bohtlingk v. Inglis*, 3 East, 381, say: “It is a little remarkable that in *Bolin v. Huffnagle*, 1 Rawle, 1 [referred to in following note], the supreme court of Pennsylvania, although their attention was called to the case last cited, decided otherwise; and principally upon the authority of the cases there commented upon, giving them an effect and bearing disclaimed by the court by whom they were decided. The learned judge,

by whom the opinion of a majority of the court was delivered, goes into an elaborate consideration of a delivery, actual and constructive, and deduces that it is only where the delivery is constructive that the right of stoppage exists. A delivery on board the consignee’s or vendee’s own ship he calls actual. But a delivery to the servant or agent of the party is as much actual as if delivered to the party himself. And whether that servant or agent is specially deputed for the purpose, or some one is deputed having similar commissions to discharge for others; whether the vendee employ his own vessel or carriage, or causes the goods to be transported for an adequate compensation in that of another, does not appear to us to make any difference. The delivery is actual in the one case as well as in the other. The sale is complete. The property is transferred. The right of stoppage is not founded upon any imperfection in the sale, nor does it rescind the contract; it only authorizes the vendor to take the goods until the price is paid. Two out of the five members of the court did not concur in the judgment cited from Rawle. The opinion of the dissenting judges seems to us to be best supported by authority.”

tinues for the purpose of stoppage until they come to his actual possession."

Other American cases, on the other hand, following the English cases in this respect, repudiate this distinction, and hold that where the seller voluntarily delivers the goods upon the buyer's own ship, without doing anything to reserve control over them, there is a termination of the transit, and therefore of the right of stoppage, regardless of their destination.¹

§ 1549. — Shipment on vessel chartered by buyer.—

Where the ship is not owned absolutely by the purchaser, but is chartered by him, the question seems to turn upon the nature of the chartering:² if it be general, as for a definite term, so

¹ *Schotsmans v. Lancashire, etc. Ry. Co.*, L. R. 2 Ch. 332; *Merchants' Banking Co. v. Phoenix Bessemer Steel Co.*, L. R. 5 Ch. Div. 205; *Berndtson v. Strang*, L. R. 4 Eq. 481, *Willis. Cas.* 394; *Turner v. Trustees of Liverpool Docks*, 6 Exch. 543, *Willis. Cas.* 228; *Ogle v. Atkinson*, 5 Taunt. 759, *Willis. Cas.* 215; *Bolin v. Huffnagle*, 1 Rawle (Pa.), 1; *Sturtevant v. Orser*, 24 N. Y. 538, 82 Am. Dec. 321.

In *Bolin v. Huffnagle*, *supra*, the court, by Rogers, J., said: "I am aware that Chief Justice Parsons [in the Massachusetts cases cited in the preceding note] put the case upon a different principle, but, for the reasons I have stated, I cannot concur with him in the view he has taken. He seems to put the right of stoppage *in transitu* on the destination of the goods or final termination of the voyage, a distinction which, with due deference, will be found unsatisfactory in its application and productive of litigation. Once establish the doctrine that the right depends on such subtle distinctions, and we shall be as much plagued with cases to settle what is meant by the des-

tinuation of the goods, and final termination of the voyage, as we have been to discover the kind of delivery which terminated the *transitus*. It is best to lay down a plain intelligible rule, easy in its application, and to leave the modification of the rule to the contract of the parties. The distinction for which Chief Justice Parsons contends does not seem to have been cordially received by the courts of Massachusetts, nor is it supported by the current of cases. Why the final destination of the goods should make the difference is not very intelligible, and has not been explained. In this case, according to the authority of *Stubbs v. Lund* (*supra*), if the goods had been shipped for New Orleans the *transitus* would have been at an end, but inasmuch as they were conveyed to Philadelphia the *transitus* continues. The propriety of the rule is certainly not very obvious, nor should mercantile cases depend on such subtle grounds." Two judges dissented.

² Mr. Benjamin (6th Am. ed., § 843) states the rule as follows: "Whether a vessel chartered by the buyer is to

that during that term, whether it be for a single voyage or more, the buyer can be regarded as the *owner* of the ship, and the master as his servant or agent, the rule above referred to operates, and the right of stoppage does not exist; but if the buyer has simply employed the ship *as carrier* to transport his goods, the right of stoppage continues until they reach their destination; and it is not material in this respect that their destination had not been communicated to the seller, or that the seller's duties as seller terminated on their delivery to the ship.¹

§ 1550. **Same subject—Reserving control.**—Notwithstanding a delivery upon the buyer's own ship, which would ordinarily amount to a termination of the transit as between buyer and seller, there may, as was intimated in the last section, be such a reservation of the power of control over them as to preserve the seller's right of stoppage.

The right to stop may, of course, be expressly stipulated for, or the circumstances may suffice to show that it had been re-

be considered his own ship depends on the nature of the charter-party. If the charterer is, in the language of the law merchant, owner for the voyage, that is, if the ship has been demised to him, and he has employed the captain, so that the captain is his servant, then a delivery on board of such a chartered ship would be a delivery to the buyer; but if the owner of the vessel has his own captain and men on board, so that the captain is the servant of the owner, and the effect of the charter is merely to secure to the charterer the exclusive use and employment of the vessel, then a delivery by the vendor of goods on board is not a delivery to the buyer, but to an agent for carriage. It is a pure question of intention in every case, to be determined by the terms of the charter-party. *Blackburn on Sale*, 242; *Fowler v.*

McTaggart, cited 7 T. R. 442, and 1 East, 522; *Inglis v. Usherwood*, 1 East, 515; *Bohtlingk v. Inglis*, 3 East, 381. See the cases collected in *Maule & Pollock on Shipping* (ed. 1881 by Pollock & Bruce), vol. I, p. 418, and a further discussion of the subject in *Sandeman v. Scurr*, L. R. 2 Q. B. 86, and the *Omoa Coal & Iron Co. v. Huntley*, 2 C. P. Div. 464. As to what amounts to a demise of a ship, see *Meiklereid v. West*, 1 Q. B. Div. 428."

¹ *Ex parte Rosevear China Clay Co.*, 11 Ch. Div. 560. In this case James, L. J., said: "The principle is this: that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier."

served. In a leading case,¹ the seller took from the master of the ship a bill of lading making the goods deliverable to the seller's order or assigns, and this was held to subject them to the seller's disposition upon the buyer's bankruptcy. The seller's right, however, in this case, as the court pointed out, was more than a mere lien: it was a reservation of the *jus disponendi*.²

§ 1551. — Shipment by carrier designated by the buyer.

The fact that the carrier to whom the goods are delivered for transportation is one named by the buyer does not defeat the right of stoppage. "A delivery to a carrier under such circumstances vests title in the vendee and places the goods subject to his risk, but the vendor does not lose his right of stoppage *in transitu* while the goods are in transit to the buyer."³

§ 1552. — Shipment through purchasing agent of buyer.

So where goods were delivered to the purchasing agent of the vendees to be transmitted by him to the vendees' factory in another State, the right of stoppage continued. The agent, said the court, stood "rather in the position of a mere forwarding agent than in that of an agent to receive the goods for the vendees' use; and no point is clearer than that a vendor, where the right to stop exists at all, may stop the goods in every sort of passage to the hands of the purchasers."⁴

§ 1553. How long the transit continues — In general.—

The transit being thus considered to begin when the goods are placed in the hands of some intermediary or middleman for transportation to the buyer, it will, in general, be deemed to continue so long as the goods remain in the custody of such an

¹Turner v. Trustees of Liverpool Docks, 6 Exch. 543. See also Van Hill, 4 Gray (Mass.), 361; Rowley v. Casteel v. Booker, 2 Exch. 691; Bigelow, 12 Pick. (Mass.) 307; Gibson Schotsman v. Lancashire, etc. Ry. v. Carruthers, 8 M. & W. 321].
Co., L. R. 2 Ch. App. 332.

²As to this, see *ante*, § 769 *et seq.* ⁴Aguirre v. Parmelee (1853), 22 Conn. 475.

³Johnson v. Eveleth (1899), 93 Me.

intermediary or middleman for the purposes of transportation and until they have reached that destination to attain which the transit was begun.

§ 1554. —. It is not necessary that the middleman or intermediary referred to should in all cases be a carrier. In the course of their journey the goods may at various times have occasion to pass through or temporarily remain in the hands of warehousemen, depositaries or forwarders; and all such persons whose employment and function is to expedite the transit are as much middlemen, and the goods in their possession are as much in transit, as though carriers, strictly speaking, were alone involved.¹

§ 1555. —. There may, however, be cases in which the goods may be intercepted, and their transit terminated, before they have reached the destination which, originally was contemplated, as well as cases in which the property in the goods, while yet in transit, may have been so transferred by the buyer to another that they would not be the property of the former in the event and at the time of his subsequently discovered insolvency. Each of these classes of cases will therefore require consideration.

§ 1556. **Buyer may intercept the goods.**— The rule is clearly settled that the vendee, if he sees fit, may meet the goods upon the way before their arrival at their contemplated destination, and take them into his own possession; and that such an interception will terminate the seller's right of stoppage.² An instance of this sort occurs where the buyer sells the goods yet to arrive and then obtains or enables his vendee to obtain them from the carrier at a point short of their original destination.

¹ Mechem's Hutchinson on Carriers, § 416; Jones on Liens, § 922. & Pul. 457; London & N. W. Ry. Co. v. Bartlett (1861), 7 H. & N. 400; Se-

² Mechem's Hutchinson on Carriers, § 418; Whitehead v. Anderson, 9 M. & W. 518; Mills v. Ball (1801), 2 Bos. 580. Reynolds v. Railroad Co., 43 N. H.

It is not indispensable that the buyer shall take the goods into his actual possession. He may here, as in other cases to be hereafter noticed, obtain a constructive possession of them, as by inducing the carrier, warehouseman, or other intermediary, to hold them thereafter not for carriage, but on deposit as his bailee; or he may give the goods a new destination and thus start them upon a fresh transit which the original seller cannot terminate.

§ 1557. — Is carrier's consent necessary? — In an English case¹ it is said that "if the vendee take the goods out of the possession of the carrier into his own before their arrival, *with or without the consent of the carrier*, there seems to be no doubt that the transit would be at an end; though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action." On the other hand it was held by the Texas court that there had been an effectual stoppage of the goods notwithstanding that "they had been by the grossest fraud anticipated on the way, and the marks changed and a new bill of lading taken in the name of a fictitious firm."²

§ 1558. Interception by buyer's agent — Agent to receive or forward. — It is not indispensable, moreover, that the buyer shall act in person; for the goods, while on their journey, may come into the hands of some agent of the buyer who has authority to give and who gives them a new direction which will terminate their transit as originally contemplated. Whether an intermediate delivery to an agent operates or not to terminate the transit is a question often difficult of determination.

§ 1559. — In a leading case³ upon this subject, the following language was used: "When an intermediate delivery occurs, before the goods reach their ultimate destination, if the

¹Per Parke, B., in *Whitehead v. Anderson* (1842), 9 Mees. & Wels. 518. ²*Poole v. Houston & T. C. Ry. Co.* (1882), 58 Tex. 134.
But see criticisms upon this view. ³*Cabeen v. Campbell*, 30 Pa. St. Benjamin on Sale (6th Am. ed.). 254, citing and relying upon *Dixon*

party to whom they are delivered has authority to receive them, and give to them a new destination not originally intended, the *transitus* is at an end. They have then reached the ultimate destination intended by both buyer and seller. But if the middleman be a mere agent to transmit the goods in accordance with original directions, the vendor's right continues. The rule may be stated as follows: If in the hands of

v. Baldwin, 5 East, 175. To the same effect is Hays v. Mouille, 14 Pa. St. 48.

In Becker v. Hallgarten, 86 N. Y. 167, Willis. Cas. 420, Adam's Cas. 43, it appeared that W. & B. and B. & S. were merchants in Berlin. The former sold goods to the latter on credit, and at their direction forwarded them to one Becker at Bremen. B. & S. pledged the goods to G., and gave him an order on Becker that the latter should hold the goods subject to G.'s order. G. shipped the goods to New York, and subsequently W. & B. attempted to stop them in transit because of the insolvency of B. & S. Said the court: "It has been held that the delivery to the vendee, which puts an end to the state of passage, may be at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself. Valpy v. Gibson, 4 C. B. 837; Biggs v. Barry, 2 Curt. 259; Bolton v. Railway Co., L. R. 1 C. P. 431; also Dixon v. Baldwin, 5 East, 175, and this case is approved in Covell v. Hitchcock, 23 Wend. 611. [See as to this case, *post*, § 1576.] In the case before us it is plain that they had reached the place for which they were intended, under the directions given by the vendors, and had come under the actual control of the vendees. Dixon v. Baldwin, *supra*, is commented upon in Harris v.

Pratt, 17 N. Y. 249, and distinguished from the rule thought applicable to the facts of that case. There the suspense in transportation was temporary, and to be resumed at a future time in the direction already given by the vendors. But, in the case before us, not only is the actual fact like that in Dixon v. Baldwin, but if the detention at Bremen was originally intended only to give the vendees an opportunity to determine by which of several routes, or at what times—as in Harris v. Pratt,—the goods should go on, we have the additional vital circumstance before adverted to, of a complete possession and control by the vendees, and its transfer to a third party, who also took the actual possession and control of the goods, and has since retained them. Neither Harris v. Pratt nor any of the other cases cited go to the extent of upholding the vendor's lien in such a case."

"The goods are regarded as in transit until they have passed out of the possession of every intermediate agency and have been actually delivered to the consignee." Weber v. Baessler, 3 Colo. App. 459, 34 Pac. R. 261. "Delivery to an agent, whether he be the agent of the vendor or the vendee, who holds the goods merely for the purpose of transmission to the vendee, is not final delivery." *Id.*

the middleman they require new orders to put them again in motion, and give them another substantive destination — if without such new orders they must continue stationary, — then the delivery is complete and the lien of the vendor has expired.”

§ 1560. —. As stated further by a learned writer: “The question, and the sole question, for determining whether the *transitus* is ended is, in what capacity are the goods held by him who has the custody? Is he the buyer’s agent to *keep* the goods, or the buyer’s agent to *forward* them to the destination intended at the time the goods were put in transit?” If he be the former, the transit is at an end; if the latter, the transit still continues and the goods may still be stopped.

§ 1561. —. A distinguished English lawyer,¹ commenting on recent English cases² upon this subject, says: “I think the following three rules reconcile all the cases which have been correctly decided, and are sufficient to solve the questions which present themselves on this branch of the law relating to stoppage *in transitu*:

“1. Where goods are sold ‘free on board,’ the transit is not at an end when the goods have been shipped, but continues until the termination of the voyage; and the goods may be stopped at any time before such termination, although the vendor may not have known, at the time of the sale, for what port they were destined.³ In the case supposed the goods are, in fact, placed by the vendor in the hands of the carrier, who is not the agent or servant of the purchaser, but an intermediary between him and the vendor.

“2. Where by the agreement between the vendor and purchaser the former is to send the goods to a place, *A*, and for that purpose they have to be placed in the hands of agents for the purpose of being transmitted to *A*, the transit is not at an

¹ Arthur Cohen, Esq., in 1 Law Quarterly Review, 397.

Davison v. Collison, “Times,” March 14, 1885.

² Kendall v. Marshall, 11 Q. B. D. 356; Ex parte Miles, 15 Q. B. D. 39;

³ Citing Ex parte Rosevear China Clay Co., 11 Ch. Div. 560; Berndtson v. Strang, L. R. 4 Eq. 481, 3 Ch. App. 588.

end until the goods arrive there, subject, however, to the purchaser's power of intercepting them by actually taking possession at some intermediate place. And this holds good, although the agents are persons appointed by the purchaser and bound to obey his orders.

"3. Where, according to the contract of sale, the vendor is to send the goods to an agent of the purchaser at *B*, the transit is at an end as soon as such agent receives them, although the vendor is informed that they are destined for another place, and are to be forwarded there by that agent, and although the latter may employ the seller's servant or agent to forward them to their ultimate destination."

§ 1562. Interception by sub-purchaser — Mere resale does not defeat stoppage.— The mere fact that the goods have been resold will not defeat the right of stoppage. "There is no doubt," said Chief Justice Redfield,¹ "if the vendee make a resale of the goods he makes it subject to the vendor's right to stop the goods *in transitu*. But this is while the goods are going to the first vendee. After the first vendee has resold them and put them on their second passage, the transit between the vendor and his vendee is at an end. But a resale will not defeat the vendor's right to stop the goods *in transitu* until they have reached their first destination, unless the bill of lading is assigned, or the vendee has anticipated the arrival and taken possession, which he may do, or the vendor consents to the resale."

§ 1563. — Indorsement of bill of lading.— Where, however, the seller delivers to the buyer a bill of lading for the goods, their transit may be intercepted and the seller's right of stoppage defeated, by a sale of the goods by the buyer and an actual indorsement of the bill of lading to a purchaser who

¹ In *Eaton v. Cook*, 32 Vt. 58. In *Pattison v. Culton*, 33 Ind. 240, 5 Am. R. 199, it is said: "A mere resale by the vendee does not, however, destroy the right to stop, and we know of no case in which it has been held to do so. 2 Kent's Com. 547, and cases there cited in the note." A sale of the goods by the consignee to the carrier in consideration of the unpaid freight does not make the carrier a *bona fide* holder, or de-

buys in good faith, in the usual course of trade, and pays value for the goods.¹

This rule, which finds its justification in the doctrines of *Lickbarrow v. Mason*,² attaches consequences to the indorsement of the bill of lading, which do not follow upon a mere contract for the sale of goods in transit, when unaccompanied by such a document. It is material, therefore, that every element essential to the operation of the rule shall be present in the case to which the rule is to be applied.

§ 1564. — **Good faith.**—Foremost among these essentials is the fact that the transferee of the bill of lading acted in good faith in acquiring it.³ An early statement of the rule which has been often quoted is that of Chancellor Kent: "If the assignee of the bill of lading has notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of stoppage as against the assignee is not gone; and any collusion or fraud between the consignee and his assignee will of course enable the consignor to assert his right. But the mere fact that the assignee has notice that the consignor is not paid does not seem to be of itself absolutely sufficient to render the assignment defeasible by the stopping of the cargo in its transit, if the case be otherwise clear of all circumstances of fraud; though, if the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent as against the rights of the consignor."⁴

feat the seller's right of stoppage. *Wheeling, etc. R. Co. v. Koontz* (1900), 61 Ohio St. 551, 56 N. E. R. 471, 76 Am. St. R. 435.

¹ *Mechem's Hutchinson on Carriers*, § 414; *Branan v. Atlanta R. Co.*, 108 Ga. 70, 33 S. E. R. 836, 75 Am. St. R. 26; *Leask v. Scott*, 2 Q. B. Div. 376, *Willis. Cas.* 448; *Loeb v. Peters*, 63 Ala. 243, *Adam's Cases*, 519, 35 Am. R. 17; *Becker v. Hallgarten*, 86 N. Y. 167, *Williston's Cases*, 420, *Adam's Cases*, 43.

² 2 T. R. 63, 1 *Smith's Lead. Cases*, 388, *Williston's Cases*, 359.

³ Thus in *Kingman v. Denison*, 84 Mich. 608, 48 N. W. R. 26, it is said: "This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value, without fraud, to have this effect. *Harris v. Pratt*, 17 N. Y. 249."

⁴ 2 Kent's Com. 550, citing *Newson*

§ 1565. — **For value.**—The transfer must also be for value. What constitutes a transfer for value is here subject to the same differences of opinion which are found to prevail in other cases (not here discussed) in which the same question is involved. A transfer in payment of an antecedent debt has been held to be sufficient,¹ though this has been doubted, while

v. Thornton, 6 East, 17; Cuming v. Brown, 9 East, 506.

In *Shepard & Morse Lumber Co. v. Burroughs* (1898), 62 N. J. L. 469, 41 Atl. R. 695, it is said: "In *Cuming v. Brown*, 9 East, 506, Lord Ellenborough said that the words '*bona fide*' in this connection do not mean 'without notice that the goods had not been paid for,' but 'without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable.' Such is the proper meaning of the expression. Something more than knowledge that the original vendor sold the goods on credit, *e. g.*, knowledge that the vendee is insolvent or does not intend to pay, is necessary to convict the second purchaser of *mala fides*."

In *Chandler v. Fulton*, 10 Tex. 1, 60 Am. Dec. 188, the rule is stated thus: "It is not absolutely necessary to the validity of the assignment that the assignee should be ignorant that the goods have not been paid for. If he takes the assignment *bona fide*, without a knowledge of any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title as against the consignor. But if, on the other hand, he takes the assignment under such circumstances, or with notice of such facts, as afford him reasonable grounds of belief that the vendee could not fairly and honestly make to him the assignment, he will be in no better condition than his assignor. It will be no answer to the

assertion of right by the consignor that the assignee of his vendee did not actually intend the commission of a fraud; he must not have had reason to know or apprehend that the consignee will defraud the consignor of the price of the goods by making the assignment. Whether he had such knowledge is, of course, a question of fact."

Evidence that the assignee knew, when he took the bill of lading, that the consignee was insolvent is relevant and proper to show, in connection with other testimony, that the assignee was not a *bona fide* purchaser. *Loeb v. Peters*, 63 Ala. 243, 35 Am. R. 17, *Adam's Cas.* 519.

The fact that the bill of lading was marked "duplicate" does not impugn the good faith of the assignee. *Missouri Pac. Ry. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. R. 608, denying opinion of *Turner, J.*, in *Castanola v. Missouri Pac. Ry. Co.*, 24 Fed. R. 267.

¹*Shepard & Morse Lumber Co. v. Burroughs* (1898), 62 N. J. L. 469, 41 Atl. R. 695; *First Nat. Bank v. Schmidt* (1895), 6 Colo. App. 216, 40 Pac. R. 479; *Leask v. Scott* (1877), 2 Q. B. Div. 376, *Willis. Cas.* 448 (denying *Rodger v. Comptoir d'Escompte, L. R.* 2 Pr. Coun. 393); *Lee v. Kimball* (1858), 45 Me. 172 (where the goods were "received in payment and discharge of the debt").

Contra, where the goods were sold to the carrier in consideration of the unpaid freight, *Wheeling, etc. R. Co. v. Koontz* (1900), 61 Ohio St. 551, 56

a transfer merely as collateral security for such a debt has been adjudged not to be for value.¹

§ 1566. — **Indorsement of bill of lading.**—It is held in a few cases that, in order to be a *bona fide* holder for value within the contemplation of the rule now under consideration, the transferee must hold by an actual *indorsement* of the bill of lading as distinguished from a delivery without indorsement.² These cases, however, are based largely upon the language of the code or other statutes, and a different rule has been applied in analogous cases.³ An actual assignment of the bill of lading, however, seems to be indispensable, and to admit of no substitute.⁴ A mere resale of the goods, as has been seen, does not defeat the right of stoppage.⁵

N. E. R. 471. See also note, 29 Am. Dec. 392, where it is said that the better opinion is that the antecedent debt is not a sufficient consideration.

¹Loeb v. Peters (1879), 63 Ala. 243, Adam's Cas. 519, 35 Am. R. 17, citing *Lesassier v. The Southwestern* (1874), 2 Woods (U. S. C. C.), 35, 15 Fed. Cas. 388. In the last case Bradley, J., said: "A transfer of a bill of lading as a mere collateral to previous obligations, without anything advanced, given up, or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage *in transitu*." See also *Vogelsang v. Fisher* (1895), 128 Mo. 386, 31 S. W. R. 13.

²*Sheppard v. Newhall*, 54 Fed. R. 306, 7 U. S. App. 544, 4 C. C. A. 352, where the court said that the right of the seller "to stop the goods *in transitu* upon discovering the insolvency of the vendee was perfect, not only as against the vendee, but as against all others, except a purchaser for value taking by indorse-

ment of the bill of lading in the usual course of business and without notice. Civil Code of California, § 2127; *Stanton v. Eager*, 16 Pick. (Mass.) 467; *Akerman v. Humphrey*, 1 Carr. & P. 53, 56. At least one of these conditions is wanting in the present case, namely, the indorsement by the party in whose favor the bill was drawn." In this case, however, the bill of lading was not drawn to the order of either the seller or the buyer, but to the order of an intermediate forwarding agent. The latter sent the bill of lading unindorsed to the buyer, who indorsed it and transferred it to the defendants. See also *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188.

³See *Holmes v. Bailey*, 92 Pa. St. 57; *Merchants' Bank v. Union R. & T. Co.*, 69 N. Y. 373; *Bank of Rochester v. Jones*, 4 N. Y. 497, 507, 55 Am. Dec. 290; *City Bank v. Rome, etc. R. Co.*, 44 N. Y. 136.

⁴In *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. R. 707, the facts were that, after the freight and

⁵See *ante*, § 1562.

§ 1567. — **Transfer after notice to stop.**— It has, moreover, in one case¹ at least, been held that a transferee of the bill of lading who acquires it in good faith will be protected, even though the seller had given notice of stoppage to the carrier before the transfer; but this ruling has not been generally approved² and seems to be in conflict with the general principles governing this subject.

§ 1568. — **Pledgee of goods — Bill of lading as security.** The bill of lading, however, may be transferred, not absolutely, but as security for loans or advances made upon the credit of the goods; and where such are the facts, the transfer will be deemed a pledge or mortgage only, and the seller may exercise his right of stoppage subject only to the lien for these advances.³ His right to reach the surplus is, however, an equitable rather than a purely legal one, and is to be worked out by equitable

wharfage were paid and the bills therefor receipted, and while the goods, though upon the wharf, were not yet actually delivered by the carrier to the consignee, the latter sold them to another who paid for them, in good faith. The consignee exhibited to his vendee the bill of lading, but did not assign or deliver it to him, but in lieu thereof gave him the receipted freight and wharfage bills, and an order upon the carrier for the goods. The sub-vendee obtained part of the goods, but before they were all delivered the original seller stopped them as in transit, and it was held that his right to do so had not been defeated. The court referred to §§ 2075, 2649, 2650, of the Georgia code, and said that nothing defeats the right of stoppage but actual possession in the vendee, or *bona fide* assignment of the bill of lading. "In this case, as to the goods remaining upon the wharf, there was neither.

. . . Confessedly there was no assignment of the bills of lading. If these bills had been assigned, that would have been equivalent to an actual delivery of the goods. The law recognizes no substitute for such assignment."

So in *Kemp v. Falk*, 7 App. Cases, 573, Willis. Cas. 405, Lord Blackburn said: "No sale, even if the sale had been actually made with payment, would put an end to the right of stoppage *in transitu*, unless there were an indorsement of the bill of lading."

¹ *Newhall v. Central Pacific R. Co.*, 51 Cal. 345, 21 Am. R. 713, Adam's Cas. 577, Willis. Cas. 424.

² Thus its soundness is denied by Mr. Hutchinson, *Carriers*, § 414; by Professor Burdick, *Sales*, p. 236.

³ *Matter of Westzinthus*, 5 B. & Ad. 817, Williston's Cases, 388; *Spalding v. Ruding*, 6 Beavan, 376, Williston's Cases, 392.

remedies,¹ unless the seller will discharge the debt which the lien secures.²

§ 1569. — **Absolute sale of goods but purchase price unpaid — Right to reach proceeds.**— Where, however, instead of a pledge or mortgage of the goods, they have actually been sold by the first purchaser but the purchase price has not been paid, may the unpaid original seller, whose right to stop the goods themselves is gone, intercept the payment from the sub-purchaser and thus reach the proceeds of the goods which otherwise might have been stopped? In an English case,³ in which the question was discussed, Cotton, L. J., stated the question thus: "Except so far as it is necessary to give effect to interests which other persons have acquired for value, the vendor can exercise his right to stop *in transitu*. It has been decided that he can do so when the original purchaser has dealt with the goods by way of pledge. Here we have rather the converse of that case. There has been an absolute sale of the goods by the original purchaser, but the purchase-money has not been paid. Can the vendor make effectual his right of stoppage *in transitu* without defeating in any way the interest of the sub-purchaser? In my opinion he can."

§ 1570. — In a later case,⁴ it was held by the court of appeal that the right existed. Two of the judges relied upon the former case, but Bramwell, L. J., declared the position sound regardless of that authority, saying: "What difference is there in principle between the case of a man selling goods on credit for £500 and these being then resold for £600, and the case of the purchaser pledging the goods for £600 with a right of sale by the pledgee? Why, if the vendor can stop the proceeds of sale in the one case, should he not have a right to stop them in the other? What injury is there to the sub-purchaser?"

¹ See Spalding v. Ruding, *supra*.

³ Ex parte Golding, Davis & Co.

² Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. R. 608 (1880), 13 Ch. Div. 628, Williston's Cases on Sales, 401.

(citing Chandler v. Fulton, 10 Tex. 2; ⁴ Ex parte Falk (1880), 14 Ch. Div.

1 Wait's Ac. & Def., p. 529, sec. 13). 446, Williston's Cases, 405.

On appeal to the House of Lords,¹ the decision of the court of appeal was affirmed, but on other grounds. Lord Selborne, however, expressed the opinion that the right of stoppage as against the purchase-money does not exist. The learned English editors of Benjamin on Sale concur in this opinion,² but the opinion of Cotton and Bramwell is not without support.³

§ 1571. Interception by buyer's creditors — Attachment — Garnishment.—The transit cannot be intercepted, and the seller's right of stoppage defeated, by the intervention of the buyer's creditors, who attach or levy upon the goods as the property of the buyer,⁴ or who garnishee the carrier⁵ as one having the buyer's goods in his possession. Such attaching or garnishing creditors are in no sense purchasers for value, and they have no rights equal or superior to the rights of the unpaid seller.

§ 1572. Interception by seller as a creditor — Attachment by seller.—Suggested by the subject-matter of the last section is the question of the effect, upon his later right of stoppage, of an attachment of the goods by the seller as creditor of the buyer—a question upon which there is apparent dif-

¹ *Kemp v. Falk* (1892), 7 App. Cas. 573, Williston's Cases, 405.

² Benjamin on Sale (6th Am. ed.), § 865a.

³ Thus, Professor Burdick (Sales, 230), to whom the writer is indebted for several valuable suggestions in this connection, thinks that the critics have not answered Lord Bramwell's question.

⁴ Mechem's Hutchinson on Carriers, § 414a; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284 [citing *Smith v. Goss*, 1 Camp. 282; *Naylor v. Denmie*, 8 Pick. 199, 19 Am. Dec. 319; *Buckley v. Furniss*, 15 Wend. 137, 144; *Butler v. Woolcott*, 2 Bos. & Pul. N. R. 64; *Nicholls v. Le Feuvre*, 2 Bing. N. C. 83; *Hays v. Muille*, 14 Pa. St. 48]; *Bayonne Knife Co. v.*

Umbenhauer, 107 Ala. 496, 18 S. R. 175, 54 Am. St. R. 114; *Harris v. Tenney*, 85 Tex. 254, 20 S. W. R. 82, 34 Am. St. R. 796; *Seymour v. Newton*, 105 Mass. 272; *Durgy Cement Co. v. O'Brien*, 123 Mass. 12; *Sherman v. Rugee*, 55 Wis. 346, 13 N. W. R. 241; *Estey v. Truxel*, 25 Mo. App. 238; *Farrell v. Railroad Co.*, 102 N. C. 390, 9 S. E. R. 302, 11 Am. St. R. 760; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. R. 84; *Morris v. Shryock*, 50 Miss. 590; *Inslee v. Lane*, 57 N. H. 454; *Kitchen v. Spear*, 30 Vt. 545; *Calahan v. Babcock*, 21 Ohio St. 281, 8 Am. R. 63; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *More v. Lott*, 13 Nev. 376.

⁵ *Chicago, etc. R. Co. v. Painter*, 15 Neb. 394, 19 N. W. R. 488.

ference of opinion. Thus Mr. Bishop¹ says that "should the seller, with full knowledge of the facts, attach them as the property of the buyer, instead of stopping them as *in transitu*, this right is gone.² But if he is ignorant of the fact that their transit has not ended, and by reason thereof takes the like step, he may stop them and decline to press his suit, on the truth coming to his knowledge."³ The Texas court, however, holds that there is no inconsistency in the two acts and hence that no waiver results.⁴

§ 1573. When transit ends — Arrival at destination.— The transit, *ex hypothesi*, continues, and the right of stoppage may be exercised, until the goods have arrived at their destination and have come into the actual or constructive possession of the buyer. What that destination is, within the meaning of this rule, while usually clear, is sometimes a question very difficult to determine, and gives rise, under the attempted application of the same rule, to decisions which can scarcely be reconciled.

In general, for the purpose of determining the right of stoppage, that place must be deemed the destination which has been agreed upon or named as such at the time of the original shipment by the seller, and the place at which, as has been seen,⁵ the goods will remain unless and until some new impetus or direction is given them by the buyer or his agent.

§ 1574. — "If the goods have so far reached the end of their journey," it is said in a recent case,⁶ "that they wait for

¹ Bishop on Contracts (ed. 1887), § 802. To same effect: 5 Wait's Actions & Defenses, 616.

² Citing Woodruff v. Noyes, 15 Conn. 335.

³ Citing Calahan v. Babcock, 21 Ohio St. 281, 294; s. c., 8 Am. R. 63 (where the court say: "The commencement of an action against the vendee by the attorney of the vendor of goods on credit, for their purchase price, without the vendor's knowledge, and before either has been ap-

prised that their *transitus* has not terminated, does not constitute a waiver of the right of stoppage, if it be asserted in a reasonable time, and the action for their price be not pressed, which the record shows to have been the facts in this case").

⁴ Allyn v. Willis, 65 Tex. 65, doubting Half v. Allyn, 60 Tex. 278.

⁵ See *ante*, § 1559.

⁶ In re Gurney, Ex parte Hughes, 67 L. T. (N. S.) 598.

new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and if without such orders they will remain stationary, the *transitus* is at an end.

“But where a place is fixed by the directions given by the buyer to the seller as the ultimate destination of the goods, and *a fortiori* if there is an express stipulation as to their destination in the contract of sale, the transit is not at an end until the goods reach that place.

“The first thing, then, one has to ascertain is whether or not there was a destination fixed by the instructions to the vendors at any time before the transit commenced. These directions may be given at the time of the order, or at some later period prior to the commencement of the transit.”

§ 1575. —. To the same point it is said, in another case,¹ that “where goods are bought to be afterwards dispatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination;” and it is further said that the principle to be deduced from the cases is, “that where goods are sold to be sent to a particular destination, the *transitus* is not at an end until the goods have reached the place named by the vendee to the vendor as their destination.”

The application of these principles to the ever-varying combinations of fact is extremely difficult, and leads, as has been noticed, to apparent contrariety of result. Each case must be determined in the light of its own facts, and seemingly slight differences are often deemed sufficient to warrant different conclusions.

§ 1576. —. In a leading case² in New York, sometimes thought to press the right of stoppage as far, at least, as it can

¹Per Bowen, L. J., in *Kendal v. Marshall*, 11 Q. B. Div. 356, citing per Bailey, J., in *Coates v. Railton*, 6 B. & Cress. 422.

²*Covell v. Hitchcock* (1840), 23 Wend. (N. Y.) 611, referred to *ante*, § 1559, note, and commented upon and doubted in *Sawyer v. Joslin*,

legitimately go, the plaintiff in New York city had sold to one Graves, a country customer, a quantity of goods to be forwarded to the latter at his place of business at Willardsburgh, N. Y. Graves directed the goods to be shipped on board a

cited in the following note. To like effect is *Halff v. Allyn* (1883), 60 Tex. 278.

In *Bethell v. Clark* (1888), 20 Q. B. Div. 615, Williston's Cases on Sales, 413, Clark & Co. of Wolverhampton had sold goods to Tickle & Co. of London. The order for the goods did not specify any place to which they were to be sent, but later the buyers wrote to the sellers, "Please consign the ten hogsheads of hollow ware to the 'Darling Downs,' to Melbourne, loading in the East India Docks here." The goods were forwarded to the ship named, but, before they were on board, the sellers learned that the buyers were insolvent and attempted to intercept them. They failed in this effort and the ship sailed for Melbourne with the goods on board, but before she arrived at Melbourne the sellers notified the ship-owners of their claim of stoppage. It was claimed that the ship "Darling Downs" was the destination of the goods and that therefore the stoppage was too late; but the queen's bench division and the court of appeal both held that Melbourne was the destination and that therefore the stoppage was effectual. Lord Esher, M. R., in delivering his judgment in the court of appeal said: "In this case the vendors being unpaid and the purchasers having become insolvent, according to the law merchant the vendors had a right to stop the goods while *in transitu*, although the property in such goods might have passed to the purchasers. The doctrine of stoppage

in transitu has always been construed favorably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: 'Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further

lake or canal boat, bound to the village of Havana, then the head of navigation and about thirty miles from Willardsburgh. The goods were boxed, directed to Graves at Willardsburgh, and put on board a canal boat for Havana. There was no

transit is a fresh and independent transit. The question is, under which of these heads the present case comes. In this case the contract does not determine where the goods are to go. It is argued for the vendors that directions were given by the purchasers to the vendors that the goods should be forwarded by carrier to Melbourne, so that while they were in the hands of any of the different sets of carriers who would necessarily be employed in so forwarding them, and until they arrived at Melbourne, they were still *in transitu*. The question, whether that is so, is a question of fact in the particular case. The goods were purchased at Wolverhampton, and, after the contract was made, the purchasers gave directions once and once only as to what was to be done with them. It was argued that those directions were to deliver them on board a particular ship in the East India Docks, and that there were no directions beyond the directions for such delivery, but that a fresh direction as to the ultimate destination of the goods would be required; and therefore the original *transitus* was at an end when the goods were put on board the ship. That question turns on the true construction of the letter of June 28th, which says: 'Please deliver the ten hogsheads of hollow ware to the "Darling Downs," to Melbourne, loading in the East India Docks here.' The argument really amounted to saying that the meaning was that the goods were to be delivered on board the ship to be

kept by those in charge of her as in a warehouse, and subject to orders from the purchasers either to deliver the goods back again out of the ship or to take them on where the ship was going. That cannot be the business meaning of the transaction. Here we have a ship loading in the docks for Melbourne, and the captain would have no authority to receive goods on board as a warehouseman, or for any purpose but to be carried to Melbourne. The meaning is that the goods were to be delivered on board to be carried to Melbourne. What would be the mode in which they would be so delivered? They would be put on board and the mate's receipt would be taken for them, the terms of which would show that the goods were received for carriage to Melbourne, and a bill of lading would afterwards be signed in the terms of such receipt. That is what was done here.

"It follows, in my opinion, that those goods were in the hands of carriers as such, and in the course of the original *transitus* from the time they left Wolverhampton till they reached Melbourne. The case therefore falls within the doctrine of stoppage *in transitu*, and is not within the class of cases where, goods going through the hands of a number of carriers, at some stage in the process fresh directions are required from the purchaser as to further carriage."

On the other hand, in *In re Gurney: Ex parte Hughes*, 67 L. T. (N. S.) 598, it appeared that Hughes, who

public carrier from Havana to Willardsburgh, and the course of business was, when goods arrived at Havana, to put them in a public warehouse for keeping until called for or ordered on by the owners. The goods in question arrived duly at Havana and were deposited in the warehouse, where they were immediately seized by the defendant as sheriff on process against Graves, who was insolvent. While thus in the hands of the sheriff, plaintiff gave notice of stoppage *in transitu*, and his right to do so was sustained. The court of errors, speaking through Chancellor Walworth, said: "In the present case the goods were directed to the vendee, at his place of business at Willardsburgh, and they were delivered at the warehouse at Havana merely because that was a point in the transit, and not because the warehouseman was the general agent of the purchaser. The fact that there was no public conveyance between Havana and Willardsburgh, and that it therefore was necessary for the vendee to send on teams himself, to complete the transit, I apprehend could not defeat the right of stoppage while the goods remained in the hands of the ware-

was trading under the name of H. E. Reynolds & Co., had sold a quantity of pipes to Gurney, trading as Barrow & Gibson. Gurney wrote to Hughes: "Please send invoice in duplicate by 2nd June.—J. H. A. and Co., Trinidad—500 boxes, two gross Reynolds' pipes;" and also sent the following instructions to be handed to the superintendent of the London Docks with the goods: "Superintendent, London Docks—Please receive the under mentioned packages to be shipped on board the *MacGarel*, Capt. —.

"Mark.

"J. H. A. & Co.,
Trinidad.

500 boxes clay
pipes.

Barrow & Gibson."

The goods were duly delivered at the London Docks, and the sellers took from the superintendent for the buyers a receipt for the goods desig-

nated "J. H. A. & Co., Trinidad, 500 boxes pipes. S. s. *MacGarel*." The sellers at that time knew that the goods were for J. H. Archer & Co., of Trinidad, having been purchased for them by Barrow & Gibson, and were to be shipped to them. The goods were shipped on the *MacGarel*, but before arrival Barrow & Gibson became insolvent and Reynolds & Co. attempted to stop them in transit, and their proceedings were sufficient if the goods on the *MacGarel* were to be deemed in transit. It was held, however, in the queen's bench division, in bankruptcy, Williams, J., that the transit ended on the delivery of the goods at the docks and the giving of the receipt for them there, and the court quoted and relied upon the rules laid down in *Bethell v. Clark*, *supra*.

houseman, who was a middleman merely, and not the general agent of either the vendor or the vendee. If the purchaser had sent on his own teams, and thus obtained the possession of the goods on a delivery thereof to his own teamsters by the warehouseman before the right of stoppage had been exercised, a different question might have been presented."

§ 1577. — In a Vermont case,¹ on the other hand, it appeared that the plaintiff, a merchant in Troy, N. Y., had sold to one Preston, a merchant doing business at Vergennes, Vt.,

¹*Sawyer v. Joslin* (1848), 20 Vt. 172, 49 Am. Dec. 768, 1 Parsons on Contracts (7th ed.), p. 646. The court cited *Richardson v. Goss*, 3 Bos. & Pul. 119; *Scott v. Pettit*, id. 469; *Leeds v. Wright*, id. 320; *Dixon v. Baldwin*, 5 East, 175; *Foster v. Frampton*, 6 B. & C. 107, 13 Eng. Com. L. 60; *Rowe v. Pickford*, 8 Taunt. 83; *James v. Griffin*, 2 Mees. & W. 623; *Wentworth v. Outhwaite*, 10 id. 435; *Dodson v. Wentworth*, 4 Man. & G. 1080, 43 Eng. Com. L. 555.

The court further said: "The cases cited and relied upon by the plaintiff's counsel, where the transit was held not to have terminated, will, I think, all be found to fall within one or the other of the following classes:

"1. Cases in which it has been held that the right of stoppage existed where the goods were originally forwarded on board of a ship chartered by the vendee. *Bohtlingk v. Inglis*, 3 East, 381, and *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 63.

"2. Where the delivery of the goods to the vendee has been deemed incomplete by reason of his refusal to accept them. *Bartram v. Farebrother*, 4 Bing. 579, 13 Eng. Com. L. 644; *James v. Griffin*, 2 Mees. & Wels. 623.

"3. Where goods remained in the

custom house, subject to a government bill for duties. *Northy v. Field*, 2 Esp. 613.

"4. Where they were still in the hands of the carrier or wharfinger, as his agent, subject to the carrier's lien for freight. *Crawshay v. Eades*, 1 B. & C. 181; *Edwards v. Brewer*, 2 Mees. & W. 375.

"5. Where the goods, though arrived at their port of delivery, were still on shipboard, or in the hands of the ship's lighter-man to be conveyed to the wharf. *Naylor v. Dennie*, 8 Pick. 198, 19 Am. Dec. 319; *Jackson v. Nichol*, 5 Bing. N. C. 508, 35 Eng. Com. L. 274; *Whitehead v. Anderson*, 9 Mees. & W. 518; *Tucker v. Humphrey*, 4 Bing. 516, 13 Eng. Com. L. 614.

"6. Where the goods had performed part of their transit, but were in the hands of a middleman, to be forwarded on by other carriers. *Mills v. Ball*, 2 Bos. & Pul. 457; *Smith v. Goss*, 1 Camp. 282; *Ellis v. Hunt*, 3 T. R. 464; *Hodgson v. Loy*, 7 id. 440; *Coates v. Railton*, 6 B. & C. 422, 13 Eng. Com. L. 196; *Buckley v. Furniss*, 15 Wend. 137."

In *Mohr v. Boston & Alb. R. Co.* (1870), 106 Mass. 67, it appeared that A sold to B in Boston a quantity of whisky then in a government

a quantity of goods which were shipped by boat to the buyer at the latter place. The regular landing place at Vergennes was a public wharf belonging to one Chapman and situate about half a mile from Preston's store. From this wharf it was the custom of consignees to get their goods as soon as they were unloaded, Chapman taking no charge of them except as an occasional matter of accommodation, and being in no sense the agent of the consignees. On the arrival of the goods in question at Chapman's wharf they were unloaded and immediately attached by the defendant as sheriff, as against Preston, who was insolvent. While so situate, plaintiff attempted to stop the goods in transit, but his right to do so was denied. "When the goods were landed on the wharf," said the court, "the result of the original impulse, impressed upon them by the vendor in transmitting them to the vendee, was accomplished. They would go no farther under that impulse. They were not in the hands of a middleman, to be forwarded by other carriers. Chapman had no charge of them, and could not therefore be a middleman; and there was no other person standing in that character. The wharf of Chapman, in the language of the books, became the warehouse of Preston for the reception of the goods, and must consequently be considered the place contemplated by the consignor as that of their ultimate destination. Preston could not have remained in his store with his arms folded expecting the goods to be driven up to his door. He must have looked for them at the wharf of Chap-

bonded warehouse in Terre Haute, Indiana. The government storekeeper gave his certificate for the whisky as the property of B; and this certificate was sent by A to B. It was part of the terms of sale that A should from time to time, as B should request, ship the whisky to Boston, paying the storehouse charges, taxes and insurance, and draw on B for the amount. A shipped four-fifths of the whisky in this way and received his pay for it. On order of B,

he procured the remaining fifth to be regauged at the warehouse, paid the charges, and consigned it to B as usual over defendant's road. B became insolvent on the day the goods reached Boston, and while the whisky was still at the depot of the railroad it was claimed by A under his right of stoppage *in transitu*. Held, that Boston, and not the government warehouse at Terre Haute, was the destination, and that the stoppage was effectual.

man, which, for the purposes of their reception, he had made his own; and when they arrived there, their *transitus*, so far as regarded the right of the vendor to stop them, must be considered as ended." The New York case above referred to was distinguished on the ground that Havana was not their point of destination and that the goods when seized were in the hands of a warehouseman holding for the consignee; while, in the case at bar, the goods had reached the place of their original direction, and were in the custody of no one unless they were in that of the consignee.

§ 1578. — **Goods not yet unloaded.**—Though the boat, car or other vehicle may have arrived at the wharf, station or other place at which the goods are to be discharged, the transit is not ended so long as the carrier has yet some further duty to perform before his responsibility as carrier ceases.¹ If, for example, therefore, the goods are still in the possession of the carrier as such, having not yet been unloaded or delivered upon the dock or wharf, or are on the carrier's lighters on the way to be delivered upon the wharf, they are still in transit and subject to the right of stoppage.²

¹ Wheeling, etc. R. Co. v. Koontz (1900), 61 Ohio St. 551, 56 N. E. R. 471, 76 Am. St. R. 435.

² Naylor v. Dennie, 8 Pick. 198, 19 Am. Dec. 319; Parker v. McIver, 1 Desaus. (N. C.) 274, 1 Am. Dec. 656; Jackson v. Nichol, 5 Bing. N. C. 508; Whitehead v. Anderson, 9 Mees. & W. 518; Inslee v. Lane (1876), 57 N. H. 454; Kitchen v. Spear (1858), 30 Vt. 545.

In Wheeling, etc. R. Co. v. Koontz (1900), 61 Ohio St. 551, 56 N. E. R. 471, 76 Am. St. R. 435, a carload of lumber which had been shipped by that railroad arrived at its destination and was placed upon a side-track and the vendee notified. The vendee did not remove the lumber or pay the freight, but after several days sold the lumber to the railroad company in pay-

ment of the freight and other indebtedness. *Held*, that the right of stoppage had not been lost, as the transit had not ended and the railroad company was not a *bona fide* purchaser.

In Inslee v. Lane (1876), 57 N. H. 454, *supra*, goods sold upon credit were sent by rail to the place of destination. Upon their arrival, the car containing the goods was set out upon a side-track, according to custom, to be unloaded, and the car was subject to a charge of \$2 per day as demurrage. The consignees were insolvent and absconded before the arrival of the goods. A local drayman, who had a standing order from the consignees to take any goods arriving for them and bring them to

§ 1579. — Goods in carrier's warehouse — Attornment.

So though the goods have been unloaded and placed by the carrier in his warehouse until the consignee shall call for them and pay the freight and other charges, they are still in the possession of the carrier, subject to his lien, and may be stopped in transit by the seller.¹ As said in a leading case in Ohio,² “the transfer of goods consigned, from the coaches of the carrier by railway to his freight depot or warehouse at the station designated for their discharge in the vicinity of the vendee's residence or place of business, there to await the payment by him of the charges thereon, as a condition precedent to their removal to and delivery at his business house, does not *ipso facto* constitute a transfer or delivery of possession to him, or to any one as agent of and for him; but is the reasonable exercise of a right and duty by the carrier, in the course and furtherance of their transit, referable to and in virtue of his original employment by and as agent of the vendor to trans-

their store, was informed of their arrival, but did not remove them. The next day the goods were attached at the suit of creditors of the consignees, removed from the car and put in charge of the drayman as a keeper. It was held that the seller's right of stoppage was intact at the time of the attachment and that the seller could recover from the sheriff.

In *Kitchen v. Spear* (1858), 30 Vt. 545, *supra*, A, residing in Vermont, purchased goods of B in New York, to be forwarded by railroad to R, where A resided. Immediately on their arrival at R, and before they were placed in the warehouse of the railroad company, A having in the meantime become insolvent, C, a creditor of A, caused the goods to be attached and to be taken directly from the cars and removed away from the railroad. The officer paid the freight upon the goods and retained possession of them under the

attachment until B demanded them of him. *Held*, that B's right of stoppage *in transitu* had not ceased at the time of the attachment or of the demand, and that he was entitled to the goods. *Sherman v. Rugee* (1882), 55 Wis. 346, is much like this case in its facts and holding.

¹ See *Mechem's Hutchinson on Carriers*, § 415.

² *Calahan v. Babcock* (1871), 21 Ohio St. 281, 8 Am. R. 63. To the same effect: *Symms v. Schotten* (1886), 35 Kan. 310, *Burdick's Cas.* 604, 10 Pac. R. 828 [citing *Rucker v. Donovan*, 13 Kan. 251; *O'Neil v. Garrett*, 6 Iowa, 480; *Buckley v. Furniss*, 15 Wend. 137; *Covell v. Hitchcock*, 23 Wend. 611; *Harris v. Pratt*, 17 N. Y. 249; *Loeb v. Peters*, 63 Ala. 243; *Newhall v. Vargas*, 13 Me. 93; *Inslee v. Lane*, 57 N. H. 454; *Hoover v. Tibbits*, 13 Wis. 79; *Atkins v. Colby*, 20 N. H. 155; *Blackman v. Pierce*, 23 Cal. 508].

port and deliver. Wherefore, until the vendee in person, or his agent under and for him, shall become custodian in possession, neither the transit of the goods nor the vendor's right of stoppage will be held to have terminated."

§ 1580. — So, again, it is said that if the goods are forwarded by direction of the vendee to a particular warehouseman, who in receiving them acts as the agent of the *vendee*, the transit is at an end; but where the warehouseman to whom the goods are directed to be sent receives them as the agent of the *carrier*, and, while he is holding the goods as such agent for the purpose of collecting freight and charges, the vendor asserts his right of stoppage, the goods will not be considered as in the possession of the vendee so as to cut off that right.¹

§ 1581. — **Carrier as bailee for buyer.**— There may, however, be some new arrangement between the carrier and the purchaser by virtue of which the carrier will cease to hold the goods as carrier and become the mere agent of the buyer for the purpose of holding possession for him; and as such an arrangement terminates the transit it *ipso facto* terminates the right of stoppage.

§ 1582. — As stated in a leading English case,² the rule is this: "When goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent."

"But," as is said in the case already referred to,³ "such agency will not be implied from the carrier's original employ-

¹ Hoover v. Tibbits (1860), 13 Wis. 565, 3 Atl. R. 423; Jeffries v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 79 (89).

² Ex parte Cooper, 11 Ch. Div. 68, R. 424, 57 Am. St. R. 919, 33 L. R. A. per James, L. J. 351; Harding Paper Co. v. Allen, 65

³ Calahan v. Babcock, *supra*. To Wis. 576, 27 N. W. R. 329; Langstaff like effect: Hall v. Dimond, 63 N. H. v. Stix, 64 Miss. 171, 1 S. R. 97, 60 Am.

ment, and can arise only by showing affirmatively some arrangement or understanding to that effect other than the general words of an ordinary consignment."

§ 1583. —. The carrier's change of character into that of agent to keep the goods for the buyer is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied;¹ though, as has several times been pointed out, "the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier and not as warehouseman; and, in order to rebut this presumption, there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him."²

Whether such an arrangement has been made is, of course, usually a question of fact.³

§ 1584. — **Deposit of goods in custom-house.**— And, finally, in this direction, the goods, instead of being deposited in the carrier's warehouse, may have been deposited in the custom-house. The effect of such a deposit, upon the termination of the transit, depends largely, as in the preceding cases, upon the peculiar facts and circumstances of each particular case.

§ 1585. —. "Where goods are placed in the public store under the warehouse system," said Chancellor Walworth in an early case, "either in this country or in England, after a perfect entry of them for that purpose, they are to be considered as having come to the possession of the vendee, at the place

R. 49; Williams v. Hodges, 113 N. C. 36, 18 S. E. R. 83; McFetridge v. Piper, 40 Iowa, 627; Farrell v. Richmond, etc. R. Co., 102 N. C. 390, 9 S. E. R. 302, 11 Am. St. R. 760, 3 L. R. A. 647.

¹ Hall v. Dimond, *supra*, quoting Benjamin on Sale (6th Am. ed.), § 853.

² Benjamin on Sale, *supra*; Ex parte Barrow, 6 Ch. Div. 783; Ex parte Cooper, 11 Ch. Div. 68; Ex parte Falk, 14 Ch. Div. 446. See also Wheeling, etc. R. Co. v. Koontz (1900), 61 Ohio St. 551, 56 N. E. R. 471, 76 Am. St. R. 435.

³ Harding Paper Co. v. Allen, *supra*.

where he intends they shall remain until he gives further orders for their disposal. . . . In such a case, I have no doubt that the right of stoppage *in transitu* should be considered as at an end the moment the goods are thus deposited after a perfect entry for that purpose has been made.”¹

§ 1586. —. “The mere fact,” however, said Lowell, J., “that goods imported from abroad upon the order of a buyer have come into the hands of the officers of the customs, and have been by them put into a warehouse, the buyer exercising no acts of ownership over them, has been held not to terminate the transit.”² As stated by Chancellor Walworth in the case first referred to, “the removal of the goods from the vessel to

¹ In *Mottram v. Heyer* (1846), 5 Denio (N. Y.), 629 [quoted in *Cartwright v. Wilmerding* (1862), 24 N. Y. 521, 537].

² In *Parker v. Byrnes* (1871), 1 Lowell, 539, 18 Fed. Cas., p. 1119. Citing *Burnham v. Winsor*, 4 Fed. Cas. 784; *Donath v. Broomhead*, 7 Pa. St. 301.

To like effect: *Sheppard v. Newnall* (1893), 7 U. S. App. 544, 4 C. C. A. 352, 54 Fed. R. 306; *Harris v. Hart* (1857), 6 Duer (N. Y.), 606; *Guilford v. Smith* (1858), 30 Vt. 49, where the cases are fully reviewed. See also *Jones on Liens*, § 931 [citing *Northey v. Field*, 2 Esp. 613; *Burnham v. Winsor*, 5 Law R. 507, 4 Fed. Cas. 784; *Parker v. Byrnes*, 1 Lowell, 539, 18 Fed. Cas. 1119; *Burr v. Wilson*, 13 Up. Can. Q. B. 478; *Lewis v. Mason*, 36 Up. Can. Q. B. 590; *Ascher v. Grand Trunk Ry. Co.*, 36 id. 609; *Mottram v. Heyer*, 5 Denio (N. Y.), 629; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 76, 104; *In re Bearns*, 2 Fed. Cas., p. 1190, 18 Nat. Bankr. Reg. 500; *Hoover v. Tibbits*, 13 Wis. 79; *Donath v. Broomhead*, 7 Pa. St. 301].

In *Lewis v. Mason* (1875), 36 Up. Can. Q. B. 590, *supra*, goods purchased

by M. in Hamilton were consigned to him by the sellers at Montreal, being delivered in bond to the railway. On their arrival at Hamilton on February 16th, they were placed in the customs warehouse and M. was notified, but allowed the goods to remain there without making entry or paying dues until May 23d, when the sellers gave notice of stoppage, as M. had become insolvent. M. had previously accepted the sellers' draft for the price, due June 14th, and they had discounted this at the bank; but they took it up at maturity and produced it at the trial. *Held*, that the stoppage was effectual as against M.'s assignees.

In *Donath v. Broomhead* (1847), 7 Pa. St. 301, *supra*, it was held that, to quote the language of the syllabus, “where goods shipped to a vendee arrived at their port of destination, and the vendee paid the freight and gave his note for the price, but the goods, in consequence of the loss of the invoice, were stored in the custom-house and remained there until the dishonor of the note, the vendor's right of stoppage remained.”

the public store by the custom-house officers, until the consignees should entitle themselves to claim the possession and disposition of the goods by completing their entry by the payment of the duties, was merely substituting the public store in the place of the vessel as a place of deposit in the transmission of the goods to their place of destination; which place of destination was the place where the consignees expected to sell the goods, or to deposit them to await their further order and direction.”¹

§ 1587. — On the other hand, however, as has been stated, when the consignee has duly entered the goods and done all that is required of him in that regard, the transit is at an end.² Such an entry, in the language of Ritchie, J., of the supreme court of Canada, is to be deemed “an acceptance of the goods by the consignee, and equivalent to taking actual possession of them; and the warehouse becomes the warehouse of the vendee, as between him and the vendor, and consequently the *transitus*, so far as the vendor is concerned, is at an end and his right of stoppage ceases to exist.”³

§ 1588. — Goods in hands of local truckman.— The goods may still be in transit, though they have passed out of

¹ In *Mottram v. Heyer*, *supra*.

² *Sheppard v. Newhall* (1893), 7 U. S. App. 544, 4 C. C. A. 352, 54 Fed. R. 306, *supra*. In this case the goods were entered in the name of the purchaser, a bond for the payment of duties given and a warehouse receipt issued to the assignees before any attempt at stoppage. “In respect to these goods,” said the court, “we have no difficulty in holding that the transit had ended before the attempt was made to stop them. . . . They had left the hands of the carrier, and the place of their deposit was in no way connected with their transmission to the purchaser. They had reached their destination, and

the purchaser had by his personal and affirmative act disposed of the goods, and his assignees had given bond for the payment of the duties upon them and deposited them in his own name in a bonded warehouse, for which they held the warehouse receipt.” *Fraschieris v. Henriques*, 6 Abb. Prac. (N. S.) 251; *Wiley v. Smith*, 1 Ont. App. 179, and *Cartwright v. Wilmerding*, 24 N. Y. 521, 537, were relied upon. See also *Burdick on Sales*, 234, citing *Cartwright v. Wilmerding*, *supra*; *Lewis v. Mason*, *supra*, and *Wiley v. Smith* (1877), 2 Can. Sup. Ct. R. 1.

³ In *Wiley v. Smith*, *supra*.

the hands of the carrier who brought them to the town or city of their destination, and are in the possession of a local truckman or other similar carrier for transportation to the buyer's place of business. Whether they are still in transit must depend upon the circumstances of the particular case. If the buyer sends his own servant and truck for the goods and the servant receives them for the buyer, the transit is at an end. And so, it has been held, is the transit ended where the local carrier has general authority to receive and receipt for all goods coming for the buyer, or special authority to receive the particular goods in question, and does so receive and receipt for them.¹

§ 1589. —. But where, on the other hand, the goods are in the hands of the local carrier as a continuation of the original transit, as where, for example, the railroad company which

¹ In *O'Neal v. Day*, 53 Mo. App. 139, a local carrier, acting under a previous general authority to receive all goods consigned to the buyer, received the goods in question at the freight office and took them to the buyer's store, but the buyer there refused to receive them because of a temporary inconvenience and directed them to be taken back to the freight office. This was done and the goods were then attached by the buyer's creditors. *Held* that, *prima facie* at least, the transit was at an end upon the receipt of the goods by the local carrier. Said the court: "If Johnson, the local carrier, was the agent of the attachment debtor, with full authority to receive and receipt for the goods, then upon the goods being delivered by the common carrier to Johnson, and upon his receipting for them, the transit was at an end. There is no pretense that the goods were to be delivered by the common carrier at the store, or at any other place but its depot; nor is there any pretense that Johnson, in receiving and receipting for the goods, acted as agent of the common carrier." In *White v. Mitchell*, 38 Mich. 390 (*post*), and in *Inslee v. Lane*, 57 N. H. 454 (*ante*), where a delivery to a local carrier under similar circumstances was held not to terminate the transit, the vendee had absconded before the arrival of the goods, and it was held that his absconding at once put an end to the local carrier's authority to receipt for him. In *Mason v. Wilson*, 43 Ark. 172 (*post*), the vendee had notified the vendor before the arrival of the goods that he would not receive them on account of insolvency, which was held to terminate the authority of a local carrier to receive them for the vendee under a general authority to receive and receipt. The case of *Macon, etc. Ry. Co. v. Meador*, 65 Ga. 705, was decided under a clause of the Georgia code which provides that the right of stoppage *in transitu* continues until the vendee obtains actual possession of the goods."

brought the goods to the buyer's town maintains its own trucks for the delivery of goods to the places of business of the consignees, or where the railroad company voluntarily delivers the goods to some local carrier to be taken to the buyer, the transit would doubtless be held to continue while the goods were in the hands of such a carrier.¹

§ 1590. —. And so it has been held that the transit continues, notwithstanding a delivery to a local transfer company, acting under previous general orders from the consignee, where the local carrier receives them for conveyance merely and not as the agent of the buyer to receive and receipt for them.²

¹ In *White v. Mitchell*, 38 Mich. 390, goods consigned to one Sternhagen, on their arrival at their destination, East Saginaw, were placed by the railway company in the hands of Hendrie & Co., a local trucking company, for delivery to the consignee, and while in the possession of Hendrie & Co. they were attached by the consignee's creditors. The court said: "We see no difficulty about the claim of stoppage *in transitu*. Hendrie & Co. seem to have been, and on this record it is enough that they may have been, intermediate carriers between the railway and the consignee, just as the railway was such a carrier between the New York carriers and East Saginaw. They had no employment or authority to act for Sternhagen, and their possession was not his possession. The goods were clearly in transit when they were taken."

² In *Scott v. Dry Goods Co.*, 48 Mo. App. 521, it was held that where a transfer company under a previous general order of the vendee receives goods at the destination depot of the carrier for the mere purpose of conveying them to the vendee's place of business, the goods are in legal con-

templation still *in transitu*, and the right of stoppage is not ended. Said the court: "The transfer company received the goods, under a previous general order, for the mere purpose of conveying them to the vendee's place of business. They were not received beyond the mere duty or position of mere carrier for the vendee. There was no absolute actual possession of the goods delivered by the carrier to the vendee. The delivery of them to the transfer company was not such delivery. Being solely for the purpose of conveyance, it did not have the effect to defeat the plaintiff's right of stoppage." *Weber v. Baessler*, 3 Colo. App. 459, is to the same effect.

In *Half v. Allyn*, 60 Tex. 278, where goods consigned to the purchaser at Blooming Grove arrived at Corsicana, the nearest railroad station and eighteen miles distant, at which place they were taken possession of by an intermediate party and, while in his possession, attached, it was held that if the goods were in the hands of this intermediate party for the purpose of forwarding them to their original destination, the transit was not ended.

In *Harris v. Tenney*, 85 Tex. 254, 20

§ 1591. — How when consignee refuses to receive goods.

If the vendee refuse to receive the goods upon arrival, either because they do not fulfill the contract, or because, by reason of his insolvency, he is desirous of protecting the seller from loss, the right of stoppage will continue.

Upon this subject Mr. Benjamin¹ says: "The question now always turns upon the point whether — *First*, the buyer has left anything undone for the perfect transfer of the *property* to himself, in which case, the sale being incomplete, he may honestly decline to complete it to the prejudice of his vendor; or, *secondly*, whether, although the transfer of the property be complete, the transit into his *possession* remains incomplete, in which event he may honestly refuse the possession, so as to leave to his vendor the right of stoppage *in transitu*, which will be equally available to the latter if he can accomplish it before the assignees get possession of the goods."²

§ 1592. — "In some early cases," says Mr. Benjamin further, "before the principles were well settled, countenance was given to the idea that a buyer might *rescind* a sale after its performance by the actual delivery of the goods into his possession, if the rescission was accomplished, and the goods returned to the vendor, before the buyer committed an act of bankruptcy;"³ but the *ratio decidendi* of these cases, he con-

S. W. R. 68, 34 Am. St. R. 796, it was held that though the goods, by the direction of the buyer, were on drays in process of being carried from the railroad station to the purchaser's store, they were still in transit, and the seizure of them by the sheriff at the suit of the buyer's creditors could not defeat the right of stoppage.

¹ Benjamin on Sales (6th Am. ed.), § 488, pp. 438, 439.

² "The different cases in which buyers have adopted this course, and thus kept unimpaired the vendor's right of stoppage *in transitu*, are:" Atkin v. Barwick, 1 Str. 165, 10 Mod.

R. 432, Fortes. 353; Salte v. Field, 5 T. R. 211; Bartram v. Farebrother, 4 Bing. 579; Smith v. Field, 5 T. R. 402; James v. Griffin, 2 Mees. & Wels. 623; Siffken v. Wray, 6 East, 371; Heinekey v. Earle, 28 L. J. Q. B. 79, 8 E. & B. 410; Bolton v. Railway Co., L. R. 1 Com. Pl. 431; Whitehead v. Anderson, 9 Mees. & Wels. at p. 529.

³ Mr. Benjamin here refers to Atkin v. Barwick, *supra*; Alderson v. Temple, 4 Burr. 2235; Harman v. Fisher, 1 Cowp. 117, and Salte v. Field, *supra*.

In Grout v. Hill (1855), 4 Gray (Mass.), 361, it appeared that the buyer, learning of his insolvency be-

tinues, "was constantly questioned, and it is now perfectly well settled that, if the insolvent vendee has come into actual possession of the goods, he cannot *rescind* the contract and return the goods to the vendor, for that would be a clearly fraud-

fore the arrival of the goods, gave notice to his son that he should not receive them, and, making a bill of sale back to the sellers, gave it to his son for the sellers' use, with a request that he should immediately notify them, which he did. Afterwards, and before an assignee was appointed, one of the sellers came to the place of destination and received the bill of sale from the son and assented to the buyer's offer to rescind the sale. It was held that the right of stoppage in this manner was perfect. Shaw, C. J., said: "It was very early held that where the consignee, being a purchaser of goods on credit, finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor, on such notice, expressly or tacitly assents to it, it is a good stoppage *in transitu*, although the bankruptcy of the consignee intervenes; and the goods revest in the consignor. *Atkin v. Barwick*, 1 Stra. 165. This was approved and confirmed in the case of *Salte v. Field*, 5 T. R. 211. The same principle was adopted in this Commonwealth, though the facts led to a different result, in *Lane v. Jackson*, 5 Mass. 157." But the court also referred to "another ground which, in our opinion, is still more decisive." It appeared that the contract of sale was executory — an order for goods to be subsequently appropriated to the contract by the seller, and forwarded

with the express understanding that if, on arrival and examination, the buyer should find the goods satisfactory he was to accept them. But here the buyer never accepted them and no property in them vested in him. There was not a rescission or resale, but simply a refusal to complete the sale. Compare with *Nicholson v. Bower*, 1 E. & E. 172.

In *More v. Lott*, 13 Nev. 376, goods consigned to the buyer arrived by wagon and were tendered to the buyer, who was insolvent and refused to accept them. The teamster then put the goods into the custody of one Pierce to be held for the freight charges. Pierce notified the sellers of the facts, but before he heard from them the goods were attached as the property of the buyer. Afterwards Pierce, by direction of the sellers, claimed the goods for them by virtue of their right of stoppage. Still later the attaching creditors paid the wagoner his freight. It was held that the transit had not ended and that the stoppage was effectual. To like effect is *Greve v. Dunham*, 60 Iowa, 108, 14 N. W. R. 130.

In *Morris v. Shryock*, 50 Miss. 590, the statement of facts is very meagre, but it appeared that goods had been ordered forwarded by boat. They reached the town of destination and were received on the wharf-boat. The buyers were insolvent and refused to receive the goods and notified the sellers of that fact. While in that situation the goods were attached at the suit of the buyers'

ulent preference in favor of the vendor." "But even if the *property* has passed, it may be that the *possession* is not yet obtained, and the buyer may then honestly reject it without exposing himself to the charge of giving an undue preference to one creditor over the others."

creditors. Subsequently the sellers sought to stop the goods in transit, and it was held that their right to do so had not been divested.

In *Mason v. Wilson*, 43 Ark. 172, certain merchants in Little Rock had purchased of plaintiff, of St. Louis, Mo., a quantity of butter, which was shipped by rail. Before the butter had been delivered to the buyers they suspended business and telegraphed to the sellers: "Business suspended. Goods at depot. Telegraph orders to agent." In the meantime a local truckman, acting under previous general orders from the buyers, took the goods from the depot to their place of business, but, finding the store closed, he deposited the butter in a warehouse, where it was attached by the creditors of the buyers. *Held*, that the right of stoppage was not defeated. See also *Heinz v. Transfer Co.*, 82 Mo. 233; *Jenks v. Fulmer*, 160 Pa. St. 527, 28 Atl. R. 841.

A temporary refusal to receive the goods because of a lack of room or the inconvenience of placing them in the store has no tendency to show that their transit was not ended. *O'Neal v. Day*, 53 Mo. App. 139.

In *Millard v. Webster*, 54 Conn. 415, 8 Atl. R. 470, the buyer, one Knapp, finding himself insolvent, made an assignment for the benefit of creditors. The second day following he declined to take the goods from the railroad station, re-marked them with the sellers' address, and

directed them to be returned to the sellers. Immediately afterwards, the goods were taken possession of by the sheriff for the assignee. The buyer then wrote the sellers that he was insolvent and that the goods were subject to their order. The sellers took no action other than the writing of a letter for the return of the goods, which was never received. The sellers then replevied the goods. The court said: "Knapp himself carefully avoided taking possession of the goods, and sought to return them to the plaintiffs; and had the plaintiffs ratified his acts before the goods were taken possession of by the deputy-sheriff after the assignment, by the order of the court of probate, for the benefit of Knapp's creditors, perhaps there might have been some ground for the claim that the plaintiffs stopped the goods *in transitu* by the action of their agent; but this they neglected to do. There appears to have been no effective action whatever on the part of the plaintiffs to stop the goods *in transitu* before the happening of that event, and we see no tenable ground for the claim."

But in *Tufts v. Sylvester*, 79 Me. 213, 9 Atl. R. 357, 1 Am. St. R. 303, it is held that, where the vendee has refused to receive the goods, the seller's right of stoppage cannot be defeated by an acceptance of them by a "messenger" appointed for the insolvent vendee to hold pending the appointment of the assignee. A

§ 1593. **Who may take possession for vendee — Agent.**— The vendee may, of course, in person, take that possession of the goods which will terminate their transit and defeat the seller's right of stoppage; and so equally may any agent of the vendee who has a general or special authority for that purpose.¹

§ 1594. — **Administrator — Assignee.**— As the successor to the vendee's rights upon his death, his administrator or executor may take possession, thereby terminating the transit and putting an end to the right of stoppage;² and so may his assignee in bankruptcy;³ but not a mere messenger appointed to hold possession until an assignee can be appointed.⁴

§ 1595. — **Not sheriff.**— A mere general creditor, however, has no implied authority to receive for the vendee;⁵ neither has the sheriff or other similar officer by virtue of a writ of attachment or execution sued out by the vendee's creditors.⁶

§ 1596. — **Or mortgagee.**— So, also, a mortgagee in possession of the vendee's goods by virtue of a mortgage expressly giving him a lien upon goods acquired after its execution is

mere general creditor cannot pay the freight and accept the goods, where the vendee has declined to receive them. *Greve v. Dunham*, 60 Iowa, 108, 14 N. W. R. 130.

¹ See *ante*, § 1559.

² *Conyers v. Ennis*, 2 Mason (U. S. C. C.), 236, 6 Fed. Cas. 377.

³ Benjamin on Sale (6th Am. ed.), § 830. The assignee, however, cannot accept if his assignor could not, or make perfect a sale upon conditions which could have been enforced against the assignor. *Lentz v. Flint & P. M. Ry. Co.*, 53 Mich. 444, 19 N. W. R. 138.

⁴ *Tufts v. Sylvester*, 79 Me. 213, 9 Atl. R. 337, 1 Am. St. R. 303. In this case, the buyer, becoming insolvent, countermanded the order, but too

late to stop the goods. Before the goods arrived the buyer had gone into insolvency, and a messenger had been appointed. On their arrival, the carrier tendered the goods to the buyer, who refused them, but the messenger accepted them and paid the charges. Before an assignee was appointed, the seller gave notice of stoppage, and it was held to be in time.

⁵ *Greve v. Dunham*, 60 Iowa, 108, 14 N. W. R. 130.

⁶ See *ante*, § 1572; *Greve v. Dunham*, *supra*; *More v. Lott*, 13 Nev. 376; *Morris v. Shryock*, 50 Miss. 590; *Mason v. Wilson*, 43 Ark. 172; *Inslee v. Lane*, 57 N. H. 454; *Harris v. Tenney*, 85 Tex. 354, 20 S. W. R. 68, 34 Am. St. R. 796; *White v. Hendrie*,

without any such implied power to accept for the vendee as will defeat the seller's right of stoppage.¹

§ 1597. **Actual or constructive possession by purchaser.** The transit continues, as has been several times observed, until the goods are reduced to "the actual or constructive possession of the buyer." It was said at one time by Lord Kenyon that the transit is not terminated until the goods have come to the "corporal touch" of the purchaser, and the code of Georgia declares that it continues "until the vendee obtains *actual possession* of the goods;" but the *dictum* of Lord Kenyon was long ago repudiated by himself² and others, and the rule of the Georgia code, as construed by the Georgia courts,³ is not elsewhere observed. On the contrary, it seems now to be generally conceded that something less than corporal touch or actual possession will suffice, and that "something" is termed a "constructive possession." What constitutes such a constructive possession as will terminate the transit has, however, never been defined, and perhaps cannot be, and the case is left to be determined by the light of special instances.

§ 1598. —. The most common form of this constructive possession is the familiar one, stated by Baron Parke in a leading case,⁴ to be, "where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him."

§ 1599. —. This, however, is not the only form of constructive possession which the cases recognize. In a Vermont

38 Mich. 390, and many other cases referred to in preceding sections.

¹ Kingman v. Denison, 84 Mich. 608, 48 N. W. R. 26, 22 Am. St. R. 711, 11 L. R. A. 347.

² See Wright v. Lawes, 4 Esp. 82.

³ See Ocean Steamship Co. v. Ehrlich, 88 Ga. 502, 14 S. E. R. 707, 30 Am. St. R. 164.

⁴ Whitehead v. Anderson, 9 Mees. & Wels. 513.

case¹ already cited,² for example, it was held that the landing of the goods upon a public wharf where the buyer was in the habit of receiving his goods, the duty and care of the carrier being at an end, and no duty or responsibility being cast upon the wharfinger, was such a constructive delivery as to terminate the transit although the buyer had not taken corporal possession of the goods.

§ 1600. —. And in a Michigan case, where the seller of logs had failed to deliver them at the place and time agreed upon, and the buyer, without objection from the seller, engaged a booming company to collect and deliver the logs at the designated place, it was held that there was such a constructive delivery as would cut off any further right of stoppage.³

§ 1601. —. But in the English case⁴ already quoted from, Baron Parke further said that it seemed "very doubtful whether an act of marking or taking samples, or the like, without any removal from the possession of the carrier as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody."

§ 1602. **Effect of part delivery.**—A delivery of a portion of the goods cannot be deemed a delivery of the whole so as to defeat the right of stoppage as to the remainder except where the circumstances show an intention to so regard it.⁵

¹ Sawyer v. Joslin, 20 Vt. 172, 49 Am. Dec. 768.

² See *ante*, § 1577.

³ Muskegon Booming Co. v. Underhill, 43 Mich. 629, 5 N. W. R. 1073.

⁴ Whitehead v. Anderson, *supra*. Parke, B., further said: "In the case of Foster v. Frampton, 6 B. & C. 107 (13 Eng. Com. L.), it is clear that there were such circumstances; whether in that of Ellis v. Hunt, 3 T. R. 464, is doubtful."

The giving of an order by a consignee of goods to the carrier in whose possession they remain, directing him to deliver them to a third person on payment of freight, does not terminate the transit or put an end to the right of stoppage. Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. R. 424, 57 Am. St. R. 919, 33 L. R. A. 351.

⁵ See *ante*, § 1499; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. R.

In an English case¹ it was held "that the vendee (who was assignee under a trust deed) took possession of part of the cargo with the intention of obtaining possession of the whole for the purposes of the trust, and therefore that such taking possession of part did put an end to the transit; but it was fully admitted in that case that the mere delivery of part to the vendee, when he meant to separate that part from the remainder, did not put an end to the right to stop *in transitu*. . . . If the vendee takes possession of part, not meaning thereby to take possession of the whole, but to separate that part, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part and no more; the right of lien and the right of stoppage *in transitu* on the remainder still continue."²

§ 1603. Effect of credit or part payment.—The fact that a term of credit was given for the price of the goods does not defeat the right of stoppage on the buyer's insolvency. Neither does the fact that payment in part has been made affect the right of stoppage for the residue,³ and the seller upon shipping

424, 57 Am. St. R. 919, 33 L. R. A. 351; *Ex parte Cooper*, 11 Ch. Div. 68; *Buckley v. Furniss*, 17 Wend. (N. Y.) 504; *Secomb v. Nutt*, 14 B. Mon. (Ky.) 261; *Tanner v. Scovell*, 14 M. & W. 28; *Dixon v. Yates*, 5 B. & Ad. 313; *Jones v. Jones*, 8 M. & W. 431; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. R. 302, 37 U. S. App. 266, 16 C. C. A. 232.

The fact that part of a lot of logs being driven by a log-driving company drifted into possession of the vendee does not destroy the right of stoppage *in transitu* as to remainder. *Johnson v. Eveleth* (1899), 93 Me. 306, 45 Atl. R. 35.

In *Kemp v. Falk*, 7 App. Cas. 573, Will. Cas. 405, Lord Blackburn said: "It may very well be that a delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If

both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole. . . . I rather think that the *onus* is upon those who say that it was so intended."

¹ *Jones v. Jones*, *supra*.

² Per Pollock, L. C. B., in *Tanner v. Scovill*, *supra*.

In *Crawshay v. Eades*, 1 B. & C. 181, the carrier had begun to unload the goods when he heard of the buyer's insolvency; he thereupon reloaded these goods and returned the whole to his own premises, and it was held that there was no delivery.

³ *Howatt v. Davis*, 5 Munf. (Va.) 34, 7 Am. Dec. 681.

the goods is not bound to refund the amount so received as a condition precedent to his right to stop.¹

§ 1604. — Effect of taking note.—Of course, payment in full destroys any occasion for stoppage, and such payment in notes or bills, if accepted as such, will be just as effectual as payment in cash.² But, under ordinary circumstances, the taking of the bill or note of the purchaser for the price does not constitute payment, and will not defeat the seller's right of stoppage if the buyer becomes insolvent.³ Neither is it necessary to tender back the bill or note so received on exercising the right;⁴ nor is it material that the paper has been negotiated if the seller regains it so as to deliver it when necessary,⁵ or, it seems, if he indorsed it on negotiation, even though he has not regained it.⁶

5. *How Stoppage May be Effected.*

§ 1605. No particular method necessary — Notice to stop. No particular method of exercising the right of stoppage is necessary. The material thing is to notify the carrier, or other person in possession, before delivery, that the seller directs the further transit of the goods to cease. The original impulse which starts the goods upon their journey to the buyer is the act of the seller in consigning the goods to him, and this impulse the seller may terminate by countermanding his original directions.⁷

¹ *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; though, of course, the buyer may claim the benefit of the part payment as an extinguishment *pro tanto* of the price. *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617.

² "When goods are purchased and paid for by the order, note or accepted bill of a third party, without the indorsement or guaranty of the purchaser, the vendor has no right of stoppage *in transitu*." *Eaton v. Cook*, 32 Vt. 58.

³ *Arnold v. Delano*, 4 Cush. (Mass.)

33, 50 Am. Dec. 754; *Newhall v. Vargas*, *supra*; *Jenkyns v. Usborne*, 7 Man. & Gr. 678, 49 Eng. Com. L.; *Edwards v. Brewer*, 2 Mees. & Wels. 375; *Feise v. Wray*, 3 East, 93; *Lewis v. Mason*, 36 Up. Can. Q. B. 590.

⁴ *Hays v. Mouille*, 14 Pa. St. 48.

⁵ *Lewis v. Mason*, 36 Up. Can. Q. B. 590.

⁶ See *ante*, § 1425; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. R. 302, 37 U. S. App. 266, 16 C. C. A. 232.

⁷ See *Mechem's Hutchinson on Carriers*, § 410.

The right of stoppage, as has been seen, is favored in the law; so much so that Lord Hardwicke, on one occasion, said that the seller might resort to any means, not criminal, to regain possession of his goods.

§ 1606. —. The usual and appropriate way is to serve upon the carrier a written notice describing the goods, directing their stoppage, and specifying the ground upon which the right to stop is based. But though reasonable description is necessary,¹ it is not indispensable that the notice state the reason,² or be in any particular form, or make use of any particular language. A demand upon the carrier for the goods, a notice to him to stop delivery, an assertion by the seller of his right to them and an endeavor to get them, shows sufficiently his purpose and is effectual to preserve the seller's right.³

§ 1607. —. The seller is not bound to *prove* to the carrier the existence of the right he claims. "The carrier," said the court in a recent case,⁴ "is not the tribunal to determine the rights of the consignor and consignee. Neither of these parties can be required to plead or make proof before the carrier. No man need prove his case to his adversary. It is sufficient if he prove it to the court. . . . It is reasonable, however, that the person assuming the right to stop goods in transit should act in good faith toward the carrier. He should, if requested, furnish him, in due time, with reasonable evidence of the validity of his claim, though it may not amount to proof. Should the consignor refuse such reasonable information as he may possess, such refusal might be construed as a waiver of his

¹ Clementson v. Grand Trunk Ry. Co., 42 Up. Can. Q. B. 263, cited in Allen v. Maine Cent. R. Co., *post*. Reynolds v. Boston, etc. R. Co., 43 N. H. 580; Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489; Atkins v. Colby, 20 N. H. 154; Stanton v. Eager, 16 Pick. (Mass.) 467; Bloomingdale v. Memphis, etc. Ry. Co., 6 Lea (Tenn.), 616; Litt v. Cowley, 7 Taunt. 169.

² Allen v. Maine Cent. R. Co., 79 Me. 327, 9 Atl. R. 895, 1 Am. St. R. 310, and valuable note.

³ Allen v. Maine Cent. R. Co., *supra*; Rucker v. Donovan, 13 Kan. 251, 19 Am. R. 84; Jones v. Earl, 37 Cal. 630; *supra*.

peculiar right, and might justify the carrier, after a reasonable time, in no longer detaining the goods from the consignee."

§ 1608. To whom notice to stop should be given — Vendee. The notice to stop the goods must obviously be given to the middleman having them in his possession at the time for the purposes of the transportation.¹ Notice, therefore, to the vendee himself not to take possession of the goods, or a demand upon him to surrender them, is clearly insufficient.²

§ 1609. — Carrier's agent.— Where the goods are in the possession of a servant or agent of the carrier, the notice, to be effective as a stoppage of the goods, must, as stated in the leading case³ upon the subject, "be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee. To hold that a notice to a principal at a distance is sufficient to re-vest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery."

§ 1610. Carrier's lien must be satisfied.— Upon exercising his right of stoppage the seller must satisfy the charges of the carrier in connection with that particular shipment, and for

¹ Méchem's Hutchinson on Carriers, § 412.

² See note to *Allen v. Maine Cent. R. Co.*, 1 Am. St. R. 312; *Mottram v. Heyer*, 5 Denio (N. Y.), 629; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. R. 84, citing *Whitehead v. Anderson*, 9 Mees. & Wels. 518.

³ Per Parke, B., in *Whitehead v. Anderson*, 9 Mees. & Wels. 518. In

Poole v. Houston & T. C. Ry. Co. (1882), 58 Tex. 134, it is said by Watts, J., that notice of stoppage given to the station agent at the point of destination, although the goods had not yet reached that place, was sufficient, as he could telegraph notice to the proper agents along the line; but this was doubted by Bonner, J.

those charges the carrier's lien is superior to the seller's right.¹ But here the carrier's preference ceases, and the seller's right of stoppage is "paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account."²

6. *Legal Effect of Stopping the Goods.*

§ 1611. **Restores seller's right of possession.**—The effect of the exercise by the seller of his right of stoppage *in transitu* is to restore to him his right of possession as it existed when the goods were shipped.³ If, after proper notice to stop, the carrier delivers the goods to the buyer or one claiming under him, the carrier will be liable to the seller for their value.⁴ So if, after proper notice to stop, the carrier, or other person having the custody of the goods, refuses to restore them to the seller in accordance with his right, the latter may maintain replevin for them, or may recover their value as for a conversion.⁵

§ 1612. **Does not rescind the sale.**—The effect of the exercise of the right of stoppage, as it seems now to be generally agreed, is not to rescind the sale, but, as was seen in the preceding section, to restore the seller to his right of possession and lien.⁶ Upon being restored to his possession, the seller's

¹ Potts v. New York, etc. R. Co., 131 Mass. 455, 41 Am. R. 247; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. R. 671, 12 Am. St. R. 885; Hays v. Mouille, 14 Pa. St. 48.

² Potts v. Railroad Co., *supra* (citing Oppenheim v. Russell, 3 Bos. & Pul. 42; Jackson v. Nichol, 5 Bing. N. C. 508, 518).

³ Diem v. Kobblitz, 49 Ohio St. 41, 29 N. E. R. 1124, 34 Am. St. R. 531, Burdick's Cases, 617.

⁴ Litt v. Cowley, 7 Taunt. 169; Ascher v. Grand Trunk R. Co., 36 U. C. Q. B. 609; Jones v. Earl, 37 Cal. 630.

⁵ See Mechem's Hutchinson on Carriers, § 420; The Tigress, 32 L. Jour. Adm. 97.

⁶ Sheppard v. Newhall, 7 U. S. App. 544, 4 C. C. A. 352, 54 Fed. R. 306; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. R. 721; Rucker v. Donovan, 13 Kan. 251, 19 Am. R. 84. See also, for example, the discussion, per Church, C. J., in Babcock v. Bonnell, 80 N. Y. 244, where, though he contends that the theory of rescission is more simple and more just, he yet admits that "the decisions in this country are quite preponderating in favor of the theory of a lien." [Citing Rowley v. Bigelow, 12 Pick.

lien revives, and the assertion of the lien, as has been already seen,¹ does not of itself effect a rescission of the sale. The goods still remain the goods of the buyer until the seller has in some way foreclosed his right; and until that time the buyer may redeem them.²

§ 1613. Remedy of seller to secure payment.—The remedy of the seller who has regained possession and revived his lien by stopping the goods in transit is that which has been already referred to in connection with the lien, namely, a sale of the goods in execution of his lien. The fuller treatment of the subject of sale for this purpose will be found in subdivision V.

III.

SELLER'S RIGHT OF STOPPAGE ON EXECUTORY SALE.

§ 1614. Nature of this right.—As has been already noticed, the right of stoppage *in transitu*, strictly so called, exists only where the title to the goods has passed to the buyer, and is therefore a right exercised by the seller upon the goods of the purchaser. But, as has also been observed, a right in many respects analogous to this, and one in fact often confused with it, exists where the sale was simply executory and where the goods, still belonging to the seller, are going forward to the buyer under an arrangement, express or implied, that the title shall or does not pass until they reach their destination, or until their approval by the purchaser, or until some other precedent condition has been performed.³

§ 1615. —. In such a case the seller may stop his own goods while in transit at any time. He may do so of his mere whim and without reason, subject of course to the buyer's

(Mass.) 307, 23 Am. Dec. 607; Stan- Conn. 53; Jordan v. James, 5 Ohio, 88;
ton v. Eager, 16 id. 467; Arnold v. Harris v. Pratt, 17 N. Y. 249.]
Delano, 4 Cush. (Mass.) 33, 50 Am. ¹ See *ante*, § 1523.
Dec. 754; Newhall v. Vargas, 13 Me. ² See *post*, § 1628.
93, 29 Am. Dec. 489; 15 Me. 314, 33 ³ Pattison v. Culton (1870), 33 Ind.
Am. Dec. 617; Rogers v. Thomas, 20 240, 5 Am. R. 199.

claim for damages for the non-performance of the contract; and clearly, if the buyer be found insolvent, the seller may properly stop in transit goods which have not been paid for, upon the general ground that he is not obliged to deliver the goods without payment to an insolvent buyer, and because it is an implied condition that the buyer upon credit shall keep his credit good.¹

§ 1616. —. Moreover, if at some stage in the transit before actual delivery the title to the goods should change and vest in the buyer, the seller's right of stoppage, strictly so called, would doubtless then arise, if thereafter, and before the termination of the transit, the buyer should be found insolvent.

§ 1617. **How right exercised — Its effect.**— This form of the right of stoppage may be exercised by any of the methods which would suffice in case the title had already passed. Its effect, however, would be to restore to the seller the possession of his own goods and to give him the same personal remedies against the defaulting buyer which exist in any case of the breach of an executory contract — remedies which are considered in later sections.²

IV.

OPTION OF SELLER AS TO REMEDIES.

§ 1618. **What remedies the seller may pursue.**—“The vendor of personal property,” it was said in a leading case,³ “in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between

¹ Pattison v. Culton, *supra*.

³ Dustan v. McAndrew, 44 N. Y. 72.

² See *post*, § 1672.

the market price, at the time and place of delivery, and the contract price." This choice of remedies has been frequently asserted, and, with perhaps some modification, seems to have become an established doctrine of our law.¹

§ 1619. —. Without stopping now to examine each branch of the rule separately, it may be said that the first remedy proposed is chiefly one against the buyer personally rather than against the goods, and will be considered in the following chapter. The second remedy proposed is one against the goods themselves, and under the general head of the seller's right of resale, both when the title has passed to the buyer and when it has not passed, will be considered in the sections of this chapter which immediately follow. The third remedy, of treating the contract as rescinded, and keeping the property as his own, will be considered later.²

§ 1620. **Equitable remedies.**— In addition to these remedies, either by personal action against the buyer at law or by resale of the goods, there is doubtless a remedy in equity for the foreclosure of the seller's lien. Thus, for example, where, by proper notice, the seller has stopped the goods in transit, he may have the aid of equity to enjoin interference with his rights or to foreclose his lien upon the goods. "I should be prepared," said Lord Justice Cairns in one case,³ "to hold this to be a case entirely within the province of this court, and depending on the ordinary principles which regulate in equity the relations of mortgagor and mortgagee, whether of real or personal property, although, for obvious reasons, cases of this kind are more generally and more conveniently brought into a court of law."

¹See *Hayden v. Demets*, 53 N. Y. 426; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. R. 415; *Mason v. Decker*, 72 N. Y. 595; *Bagley v. Findlay*, 82 Ill. 524; *Ames v. Moir*, 130 Ill. 582, 22 N. E. R. 535; *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 24 S. E. R. 800; *Lassing v. James*, 107 Cal. 348, 40 Pac. R. 534.

²See *post*, § 1681.

³*Schotsmans v. Lancashire, etc. Ry. Co.* (1867), L. R. 2 Ch. App. 332.

V.

THE SELLER'S RIGHT OF RESALE.

§ 1621. *How here considered.*—The question of the right of the seller to resell the goods may arise either where the original sale was complete and executed or where it still remained executory. Each class of cases will be separately considered.

1. *When Title has Passed.*

§ 1622. *In general.*—The seller of goods who, notwithstanding the passing of the title, has them still in his possession, either because they have never passed beyond his control or because he has regained them by stopping them in transit, finds himself, upon default of the buyer to take and pay for them, whether because the latter refuses to recognize the obligation of the contract or because of his insolvency and consequent inability to perform, in possession of a right which has been seen to be at least a lien,¹ and, according to the better statement, a special property in the goods which now avails for his protection.

How much greater than a mere lien it is will be apparent when it is recalled that the ordinary common-law lien is a bare right of detention with no power of sale attached to make the right effective, while the lien of the unpaid seller carries with it the right to sell the goods for the satisfaction of the seller's claim.²

§ 1623. —. The difference between the two situations was stated in a recent case³ before the New York court of appeals as follows: "When the price of goods sold on credit is due

¹ See *ante*, § 1471.

² See this fully explained in *Arnold v. Carpenter*, 16 R. I. 560, 18 Atl. R. 174.

³ *Tuthill v. Skidmore*, 124 N. Y. 148, 26 N. E. R. 348.

So also in *Van Brocklen v. Smealie*, 140 N. Y. 70, 35 N. E. R. 415, it is said: "The right of the unpaid vendor is deemed sometimes analogous to the pawnee's right of sale, and sometimes to the right of stop-

and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu*, or retains them before *transitus* has begun, he can, by a sale made on notice¹ to the vendee, vest a purchaser with a good title. His right is very nearly that of a pledgee with power to sell at private sale in case of default." The occasion here referred to for the exercise of the right is that of the insolvency of the buyer, but the right extends to the case in which the buyer's default is wilful and he is seeking to escape the obligations of the contract, as well as to cases of mere insolvency.

§ 1624. To what kinds of property right of resale attaches.

This right of resale extends to personal property of every description—to every kind, in fact, which could be made the subject of the original agreement to sell.² It extends, therefore, to an interest in a partnership whose assets embraced both real and personal property.³

§ 1625. When right may be exercised.—“There is a dearth of authority,” said the supreme court of Illinois in a recent case,⁴ “as to what steps the vendor should take to enforce his lien after stopping the goods, to be accounted for, no doubt, as was said in *Newhall v. Vargas*,⁵ ‘by supposing that the vendor usually obtaining all the goods sold finds he is fully paid, or,

page *in transitu*. Whatever it be, it is at least a lien upon the property sold for the purchase price so long as it remains undelivered, which lien the vendor may enforce by a sale, and then recover any balance of the contract price unrealized.”

¹ Whether notice is indispensable is considered later. See § 1632, *post*.

² *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. R. 415; *Pollen v. Le Roy*, 30 N. Y. 549.

³ *Van Brocklen v. Smeallie*, *supra*.

⁴ *Shaw v. Lady Ensley Coal Co.*, 147 Ill. 526, 35 N. E. R. 620.

⁵ 15 Me. 314, 33 Am. Dec. 617.

if not, that the object of pursuing the insolvent vendee is not worth the trouble and expense.' It is, however, well understood that the first duty of the vendor after regaining possession is to hold the goods until the purchase price becomes due under the contract of sale, so as to deliver them upon payment."

§ 1626. — **Duty to hold goods until price due.**— This duty, however, to hold the goods until the purchase price becomes due is not an invariable one. Suppose, for example, that the goods are perishable, or that the price is subject to fluctuations, or the term of credit is very long, or the goods are expensive to keep, while the buyer at the time fixed for delivery is insolvent: would the rule then apply? Upon this subject the supreme court of Ohio¹ has said: "Upon what just principle can the seller in such a case be required to hold the goods until the expiration of the credit? It is true that, at that time, the vendee may again be solvent, and able to pay. There is no presumption, or assurance, that he will. If any presumption arises, it is rather that the insolvency will continue, which is more in accordance with the experience of the commercial world. But, as we have seen, it is part of the vendee's engagement that he will maintain his credit, which is broken by his insolvency. And it would be unjust to require the vendor to sustain the loss resulting from the destruction or deterioration of the goods in the meantime, which, in many instances, must ensue if the seller is compelled to keep the goods shut up, and take the risk of the future solvency of the buyer. The injustice of such a requirement is conceded where the goods are of a perishable nature; and the vendor, it is now settled, is not obliged to keep goods of that character until the termination of the credit. In the notes to *Lickbarrow v. Mason*, in Smith's Leading Cases,² it is said: 'But what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep

¹ *Diem v. Kobnitz*, 49 Ohio St. 41, v. Cunningham, 9 Port. (Ala.) 104, 33 29 N. E. R. 1124, 34 Am. St. R. 531; Am. Dec. 300.

Williston's Cases, 426. See also West ² Vol. I, pt. 2, p. 1199.

them until the time of credit has expired? In such a case it is submitted that courts of law, having originally adopted this doctrine of stoppage *in transitu* from equity, would act on equitable principles by holding the vendor invested with an implied authority to make the necessary sale.’”

§ 1627. — “It is insisted, however,” continued the court, “that the right of sale in such cases constitutes an exception to the rule. In our opinion, the reasons upon which the exception rests, if it be such, should make the exception the general rule. The value of many kinds of merchandise, not perishable, depends largely upon their being in the market at the appropriate seasons, and to supply temporary demands; and if not available for those purposes at the proper time, they become comparatively worthless, or so reduced in value as to entail great loss, which may be less only in degree, though greater in amount, than where the goods are perishable; and it is no more just or equitable to subject the vendor to loss in the one case than in the other. The right of resale ought not, we think, be made to depend upon the degree or extent of the loss that must ensue, if it should be denied. It rests upon a different principle, and grows out of the failure of the vendee to keep his engagement.”

§ 1628. — **Buyer’s right to redeem the goods.**—The assertion of a lien¹ or the exercise of the right of stoppage² does not, as has been already seen, operate as a rescission of the sale. Either act presupposes that the title is in the buyer and that the seller has simply a charge upon the goods to enforce the payment of the price. The vendee, therefore, at any time before his right has been foreclosed, may tender payment of the price and redeem the goods. As stated in one case,³ “the cases agree that the vendee may, at any reasonable time after the vendor has stopped the goods, enforce his claim to them by the payment of the purchase-money according to the terms of the original contract.”

¹ *Ante*, § 1523.

² *Ante*, § 1612.

³ *Patten’s Appeal*, 45 Pa. St. 151,
84 Am. Dec. 479.

§ 1629. **Seller as agent of the buyer.**—It is commonly said that, in making sale of the goods, the seller acts as agent of the buyer,¹ but this is true only in a somewhat qualified sense. The goods—speaking still of the case where the title has passed—are the goods of the buyer, and the seller, in selling them, sells the buyer's title therein, but he does this not by virtue of any present contractual consent or authorization of the buyer, but rather by virtue of an authority conferred upon him by the law for the protection of his lien upon, or interest in, them. He is agent of the buyer in the same sense that a pledgee is agent of the pledgor in selling the goods pledged, and no further.²

When, hereafter,³ the vendor's right of resale where the title has not passed arises for consideration, the oft-repeated statement that the seller acts as agent for the buyer will be seen to be still more inaccurate.

§ 1630. —. Even, however, if the seller is to be regarded as agent of the buyer, it seems to have been necessary to decide what would have been thought apparent from the very nature of the case, that this fact does not make the latter so far the absolute owner of the goods as to cut off the former's right to proceed against them to secure his pay.⁴

¹See *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; *Pollen v. Le Roy*, 30 N. Y. 549; *Smith v. Pettee*, 70 N. Y. 13; *Davis Sulphur Ore Co. v. Atlanta Guano Co.* (1900), 109 Ga. 607, 34 S. E. R. 1011; *Bagley v. Findlay*, 82 Ill. 524.

²See *Moore v. Potter*, in following note.

³See *post*, § 1645.

⁴*Moore v. Potter*, 155 N. Y. 481, 50 N. E. R. 271, 63 Am. St. R. 692. The buyer, a corporation, had become insolvent and gone into the hands of a receiver. The seller, after reselling the goods refused by the buyer and the receiver, sought to recover the defi-

ciency from the assets of the buyer; and it was claimed that in selling them he had acted as agent of the buyer, thereby recognizing the latter's title, and had put himself in contempt by selling property in the legal custody of the receiver without previous permission of the court. The court below sustained this view, but its judgment was reversed in the court of appeals, where Martin, J., for the court, said:

"It is to be observed that in many of the cases cited it has been said that, in thus selling the property, the vendor acts as the agent of the vendee for that purpose. Clearly, the use

§ 1631. **Buyer as agent of seller.**—In making the resale the seller need not act in person. He may employ an agent here as in any other case. He may even employ the buyer to

of the words 'as agent of the vendee' was not intended as a determination that the relation between the parties was that which ordinarily exists between a principal who owns property and an agent who may be authorized to manage or sell it. But it is a general expression, which has been somewhat inaccurately used to define the right of a vendor to make a resale and hold the vendee responsible for his loss. It is quite manifest that a resale made under such circumstances is not made by the vendor strictly as the agent of the vendee, but he acts for himself in disposing of the property for the purpose of ascertaining the actual damages he may sustain. Doubtless, in making it, the vendor would be bound to sell within a reasonable time, to exercise good faith to effect a sale at the best price he could obtain, to follow any proper instructions the vendee might give as to the time and manner in which it should be made, and to give credit upon the contract price for the amount received. His duties in making the sale may, in some respects, resemble those of an agent, and thus the expression that he acts 'as the agent of the vendee' has arisen. That he owes the vendee the duty to thus conduct the sale is clear, but that his acts in making it can be properly regarded as the acts of an 'agent,' as that word is generally understood, is quite otherwise. Surely, the fact that a vendor might seek this remedy against an insolvent or doubtful vendee would not confer upon the latter such a title as would enable him to demand and hold the property with-

out complying with the terms of the contract. To say, then, that the vendor becomes the agent of the vendee in making the sale is not quite correct, and is to be regarded, at most, as a mere fiction of law, and the beneficial title does not pass to the vendee.

"The first case in this state which has come to our notice relating to this subject is *Sands v. Taylor*, 5 Johns. 395. In that case the right to make a resale and hold the vendee responsible for the difference between the contract price and the amount received upon a resale was considered and held to exist by a unanimous court. Several opinions were written. Some of the judges expressed the view that, after a vendee had refused to accept the property, the vendor became a trustee or agent by necessity to sell the property, but that the exercise of the right to sell was not a waiver of his rights under the contract. Others based this right, not upon any principle of agency, but upon the existence of a common usage, which was said to be convenient and reasonable, and should be sustained by the courts. While the court unanimously held that the right of resale existed, there was some difference of opinion as to the precise language which should be employed in describing that right, or the principle upon which it was founded; some holding that it existed by virtue of a common usage, which was sanctioned by the courts, while others were of opinion that the vendor became an agent of the vendee by necessity. It is quite obvious that the language employed in

make the resale, and, if he does so, it will not necessarily result in a rescission of the contract.¹

§ 1632. **Notice of resale.**—The question of the necessity of giving the buyer notice of the resale, where the buyer is to be held responsible upon the basis of its results, involves at least two separate ideas—the necessity of giving notice of the seller's *intention* to resell, and the necessity of giving notice of the *time* and *place* of the resale.

§ 1633. — 1. **Notice of seller's purpose to resell.**—As to the necessity of notice of the intention to resell, the author-

that case has led to the use of the words 'as agent for the vendee' in stating this rule in the subsequent cases. When, however, we consider the manner in which the use of this phrase arose, and the sense in which it was used, it becomes quite apparent that it was employed merely for the purpose of briefly describing the right which a vendor possessed to make a resale. It is clear that the court in that case did not hold, or intend to hold, that the general relation of principal and agent existed between the parties. But, even if it could be regarded as proper in such a case to define the position of a vendor as that of an agent by necessity, yet, when the sense in which the term is used is understood, it is plain that it is not to be regarded as an assertion that the vendee becomes the absolute owner of the property by the act of the vendor in thus seeking to establish the amount of his actual loss. It would be manifestly unjust to hold that in such a case the title passed to a vendee, and that the vendor could not adopt this method of reducing the amount of his damage, and ascertaining the precise amount of his loss, without assuming

the risk which might follow if the title actually passed to the vendee without payment, upon the vendor's election to pursue that method of indemnifying himself. Moreover, even if it could be said that the title passed to the vendee, still the vendor would retain his lien for the purchase price that could be foreclosed by a sale, and which would continue in the vendor not only the right of possession, but the right to sell and hold the defendant for any deficiency that might arise. Although a vendor may elect to pursue that method of indemnifying himself against loss, the title still remains in him to an extent which would prevent the vendee from demanding or recovering the property sold without complying with the provisions of the contract. Therefore, the general term erred in holding that the title to this property passed to the receiver, so that the vendor was unauthorized to pursue that method of ascertaining the amount of the loss for which the defendant should be held responsible without the consent of the court."

¹ Grist v. Williams, 111 N. C. 53, 15 S. E. R. 889, 32 Am. St. R. 782.

ities seem to be in hopeless conflict. On the one hand, it is said, in Illinois¹ and elsewhere,² that no such notice is necessary, and this is declared to be the rule after "a review of the authorities, American and English." On the other hand, in Indiana³ it is declared that such notice is indispensable, and that this is the rule sustained by the weight of authority. "The giving of notice," it is there said, "is a material element in the cause of action, and it must be stated in the complaint." In New York notice seems not to be indispensable, although the court, in a late case,⁴ say "it is always wiser for the vendor to give notice of his intention to resell, and quite unsafe to omit it." In several of the cases upon this subject the two kinds of notice above referred to, *i. e.*, notice of intention to resell, and notice of the time and place of sale, are confused, and in some distinction is made between cases in which the title has passed and those in which it has not passed, while in other cases such a distinction is ignored.

§ 1634. —. The rule, however, which, it is believed, is sustained by the weight of authority is, that unless the goods are perishable, or other special circumstances would render notice impracticable or unavailing, notice of the seller's intention to resell must be given, if the seller intends to make the

¹ See *Ullman v. Kent*, 60 Ill. 271; *Maulding v. Steele*, 105 Ill. 644; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. R. 790; *Roebeling Sons' Co. v. Fence Co.*, 130 Ill. 660, 22 N. E. R. 518; *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. R. 837; *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. R. 406; *Rice v. Glass Co.*, 88 Ill. App. 407. See also *Arnold v. Carpenter*, 16 R. I. 560, 18 Atl. R. 174; *Rosenbaum v. Weeden*, 18 Gratt. (Va.) 785, 98 Am. Dec. 737.

² See *Waples v. Overaker*, 77 Tex. 7, 13 S. W. R. 527, 19 Am. St. R. 727 [but see *Leonard v. Portier* (Tex.), 15 S. W. R. 414]; *Magnes v. Sioux City Nursery Co.* (1900), 14 Colo. App. 219,

59 Pac. R. 879 [though the rule is said to be confined to the circumstances of that case]; *Clore v. Robinson* (1897), 100 Ky. 402, 38 S. W. R. 687.

³ See *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. R. 861 [citing *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. R. 348; *Redmond v. Smock*, 28 Ind. 365; *Pittsburgh, etc. R. Co. v. Heck*, 50 Ind. 303; *Fell v. Muller*, 78 Ind. 507; *Dwiggins v. Clark*, 94 Ind. 49; *Shippis v. Atkinson*, 8 Ind. App. 505, 36 N. E. R. 375; *Browning v. Simons*, 17 Ind. App. 45, 46 N. E. R. 86].

⁴ *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. R. 415.

price realized upon the resale the basis of his recovery against the buyer.¹

§ 1635. —. Even though otherwise requisite, the notice may be waived by the buyer; and such a waiver may well be presumed where the buyer tells the seller he may do what he chooses with the goods.²

§ 1636. —. No particular *form* of notice seems to be requisite. The seller, it has been said,³ “must manifest his election by preliminary notice that he intends to sell and hold the vendee for the loss, or notice to that effect.” But, on the other hand, it has been said that it is not necessary “for the notice to state just what action” the seller will “take to indemnify himself against loss, even if it be conceded that a notice was required;” and under this view a notice by the seller that he would “protect himself” was held sufficient, as the buyer must be presumed to have known what right his failure to receive the goods would give the seller.⁴

§ 1637. — 2. Notice of time and place of resale.— But whatever difference of opinion there may be respecting the necessity for notice of the purpose to resell, it seems quite unanimously agreed that notice of the time and place of the sale is not required,⁵ though, when practicable, the giving of such a notice would be safe and proper.⁶

§ 1638. Place of resale.— With respect of the place at which the resale should be made, no hard-and-fast rule can be laid

¹ See *Penn v. Smith*, 98 Ala. 560, 12 S. R. 818; *Holland v. Rea*, 48 Mich. 218, 12 N. W. R. 167; *Green v. Ansley*, 92 Ga. 647, 19 S. E. R. 53; *Davis Sulphur Ore Co. v. Atlanta Guano Co.* (1900), 109 Ga. 607, 34 S. E. R. 1011; *Leonard v. Portier* (1890, Tex. App.), 15 S. W. R. 414; *Winslow v. Harri-man Iron Co.* (1897, Tenn. Ch.), 42 S. W. R. 698.

² *Wrigley v. Cornelius* (1896), 162 Ill. 92, 44 N. E. R. 406.

³ *Holland v. Rea*, 48 Mich. 218, 12 N. W. R. 167.

⁴ *Ingram v. Wackernagle*, 83 Iowa, 82, 48 N. W. R. 998.

⁵ See *Pollen v. Le Roy*, 30 N. Y. 549; *Rosenbaum v. Weeden*, 18 Gratt. (Va.) 785, 98 Am. Dec. 737.

⁶ See *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. R. 415.

down. A particular place is not to be insisted upon, but good faith, and a fair and reasonable endeavor to get the best available price for the goods, are essential. The place at which the buyer was to receive the goods is not necessarily the best place for the resale;¹ neither is the nearest market or even a market within the State² necessarily the most appropriate. Regard must be had for the character of the goods and the times, circumstances and places that regulate and control their price.

§ 1639. — “If the place of delivery affords no market for the article sold,” it is said in one case,³ “it is the duty of the vendor to send the goods to the nearest and most available market, and there dispose of them in such a way as to produce the largest possible results;” and if this requirement of the “nearest and most available market” be qualified, as it undoubtedly must be, by reference to the character, situation and circumstances of the goods, it presents the rule which should apply. If there are two or more markets thus available, the seller’s choice of any one, if made in good faith, cannot be complained of; and, in any event, a reasonable discretion as to the place of sale must be accorded to the seller.

§ 1640. **The manner of resale.**—Neither is any particular manner or method of making the resale necessary. “The resale may be made at public auction or privately, and it often happens that the goods can be best sold at private sale; but, whether in the one mode or the other, in the absence of any instructions from the buyer, the vendor has the right to exer-

¹ See *Lewis v. Greider*, 51 N. Y. 231; *Ingram v. Wackernagle*, 83 Iowa, 82, 48 N. W. R. 998; *Anderson v. Frank*, 45 Mo. App. 482.

² See *Anderson v. Frank*, *supra*; *Ingram v. Wackernagle*, *supra*; *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. R. 1012. In these cases, the right of the seller to resort to the great markets for the kind of goods in question, *e. g.*, St. Louis and Chicago, was upheld.

But such a course can only be sanctioned where the distant market really affords the best and most appropriate means of ascertaining the value. An unnecessary and arbitrary removal of the goods to some distant place for sale will not be tolerated. *Chapman v. Ingram*, 30 Wis. 290; *Rickey v. Tenbroeck*, 63 Mo. 563. See also *Guillon v. Earnshaw*, 169 Pa. St. 463, 32 Atl. R. 545.

³ *Anderson v. Frank*, *supra*.

cise his discretion within reasonable bounds; and whether this discretion is exercised properly and in good faith are questions of fact for the jury."¹

§ 1641. —. If usage or the course of trade has established a particular method or medium of sale, as, for example, through the negotiation of brokers, the seller may and usually should adopt such customary means.²

§ 1642. Time of resale.— In selecting the date of the resale, the seller is charged with the duty of reasonable prudence

¹ Penn v. Smith, 98 Ala. 560, 12 S. R. 818; Whitney v. Boardman, 118 Mass. 242. Sale need not be by auction. Hayes v. Nashville (1897), 80 Fed. R. 641, 26 C. C. A. 59, 47 U. S. App. 713.

As stated in Rosenbaum v. Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737, "generally, he ought to sell them at auction, because generally they will sell to most advantage in that way. But he need not always sell them in that way, and it would be improper for him to do so if it happened that they would sell to greater advantage in some other way. Crooks v. Moore, 1 Sandf. (N. Y.) 297, is an important case on this subject and the reasons assigned by the court are very strong. The resale in that case was of iron, and it was a private one, made through a broker in metals. It was contended that it should have been made at auction. 'As to this point,' the court said, 'we are not aware that there is any rule of law which requires resales to be made at auction, and in no other mode. We believe the more sensible rule to be, that the seller must dispose of the goods in good faith, in the mode best calculated to produce their value. If the usual mode of selling the particular goods in the market where

they are offered be at public auction, he ought unquestionably to dispose of them in that manner. If, however, large dealers in the article in question never send such goods to auction, and they will sell to more advantage through a broker, it is equally his duty to offer them in the market through a broker's agency.'"

² Pollen v. Le Roy, 30 N. Y. 549. In Brownlee v. Bolton, 44 Mich. 218, 6 N. W. R. 657, it is said "that the vendor's right of resale must be exercised in good faith, and in such time and manner, and under such circumstances, and by such methods, as will be best calculated to produce the fair value of the property; and that in case he seeks to avail himself of it before a jury it is incumbent on him to adduce the necessary facts to show that in exercising the right this manner was observed." In Bagley v. Findlay, 82 Ill. 524, it is said that "the vendor takes the position of agent for the vendee [see *ante*, § 1629], and is held to the same degree of care, judgment and fidelity that is imposed by the law upon an agent put in the custody of such goods in such condition with instructions to sell them to the best advantage."

and good judgment.¹ He is not obliged to proceed within the shortest possible or even within the shortest reasonable time. "If made within a reasonable time," it has been said, "that is all that can be required, and the sale cannot be invalidated by showing that it might have been made sooner than it was." In other cases, "due diligence" has been adopted as the standard.²

§ 1643. Effect of resale in determining value.—The effect of a resale, properly made,—speaking still of the case in which the title has passed, and the seller is reselling the buyer's goods under the power of resale,—is that the amount realized upon such resale, less the reasonable expenses of making it,³ indicates the amount to be credited to the buyer upon the purchase price and determines the balance for which he remains liable to the seller.⁴

¹ *Smith v. Pettee*, 70 N. Y. 13; *Pickering v. Bardwell*, 21 Wis. 562.

If the seller delay for what appears to be an unreasonable period without explanation, the price realized on the resale will not be conclusive. *Camp v. Hamlin*, 55 Ga. 259. An unexplained delay of fifteen months was held too long in *Pickering v. Bardwell*, *supra*. On the other hand, two months' delay on a falling market was held not unreasonable in *Rosenbaum v. Weeden*, *supra*.

In *Smith v. Pettee*, *supra*, it is said that the sellers would doubtless be bound to obey any instructions which the buyers might give them as to the time and manner of sale, and which they could follow without sacrificing their lien for the price; but in the absence of any such instructions they have the right to exercise their discretion within reasonable bounds.

Where the goods were perishable, the court in California said: "We

think it was plaintiff's right — perhaps its duty — to sell them forthwith, and in this manner reduce its damages. *Hill v. McKay*, 94 Cal. 5, 29 Pac. R. 406." *Tustin Fruit Ass'n v. Earl Fruit Co.* (1898), 121 Cal. xviii, 53 Pac. R. 693.

² *Smith v. Pettee*, *supra*.

³ But not, it seems, the personal expenses of the seller in coming to the place of sale. *Penn v. Smith*, 93 Ala. 476, 9 S. R. 609.

⁴ *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; *Pollen v. Le Roy*, 30 N. Y. 549; *Smith v. Pettee*, 70 N. Y. 13; *Dustan v. McAndrew*, 44 N. Y. 72; *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. R. 1012; *Lewis v. Greider*, 51 N. Y. 231; *Rice v. Manley*, 66 N. Y. 82; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. R. 415; *Young v. Mertens*, 27 Md. 114; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Van Horn v. Rucker*, 33 Mo. 391; *Anderson v. Frank*, 45 Mo. App. 482; *Bagley v. Findlay*, 82 Ill. 524; *Roebling's Sons Co. v. Fence*

This result is based upon the ground that the seller has sold the buyer's goods by virtue of an authority conferred upon him by the law, and that the sale is, in legal effect, the act of the buyer, entailing upon him the same consequences as though he had sold the goods himself and applied the proceeds upon the purchase price.

§ 1644. Title of the purchaser at the resale.—The title which the purchaser at the resale can acquire must depend upon the existence of the vendor's right to make it and upon the regularity of the proceeding. Mr. Benjamin has stated the rule to be that, "where there has been a resale, the title of the second purchaser depends on the fact whether the first buyer was in default, for if not he may maintain trover." This

Co., 130 Ill. 660, 22 N. E. R. 518; Morris v. Wibaux, 159 Ill. 627, 43 N. E. R. 837; Wrigley v. Cornelius, 162 Ill. 92, 44 N. E. R. 406; Whitney v. Boardman, 118 Mass. 242; Ingram v. Wackernagle, 83 Iowa, 82, 48 N. W. R. 998; Phelps v. Hubbard, 51 Vt. 489; Haines v. Tucker, 50 N. H. 307; Woods v. Cramer, 34 S. C. 508, 13 S. E. R. 660; Cook v. Brandeis, 3 Metc. (Ky.) 555; Bell v. Offutt, 10 Bush (Ky.), 632; McCord v. Laidley, 87 Ga. 221, 13 S. E. R. 509.

In Pennsylvania the resale seems to be only one method of determining the value, and its results not necessarily conclusive. Thus in *McCombs v. McKennan*, 2 W. & Serg. 216, in speaking of the assignments of error, the court said: "The fifth error [assigned] is in stating that the measure of damages would be the difference between the contract price of seed and the price it subsequently sold for. To this, however, the court added, provided that sale was made *bona fide* and to the best advantage of all concerned, and that the jury are not bound by this rule if they

can find another more in accordance with the justice of the case. And this appears to be the same kind of direction which was given in the case of *Andrews v. Hoover*, 8 Watts, 239, and approved by this court; and also in *Girard v. Taggart*, 5 Serg. & R. 19. A resale is a usual mode to ascertain the difference between the contract price and the value of the article, when the vendee refuses to accept it. But it is not the only mode, nor even when it takes place is it decisive. The jury may as was the case here, have evidence of other kinds to show the value, and are to judge in the best manner they can from the whole case. The law lays down no one mode as the exclusive one for settling the value of an article in market, at or about a given time; it is a matter to be left to the jury on the evidence, and that seems to be the principle of the cases. To like effect, see *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300.

¹ Benjamin on Sale (6th Am. ed.), 795.

language was construed by the court in Rhode Island as “evidently implying that, if the first buyer be in default, the purchaser at the second sale acquires a good title, or at least immunity from suit in trover or replevin.”¹ The court also quoted with approval the statement of Mr. Schouler,² that “the buyer’s default, followed by the seller’s resale, seems to constitute a rescission of the contract in such a sense that the buyer is not permitted to follow the goods into the new purchaser’s hands and reclaim them as his own, but must look to his own adjustment of damages with the seller for indemnity, if indemnity be his due.”

This fiction of rescission seems contrary to the fact, and no reason is apparent why the ordinary rules applicable to one who purchases at a sale *in invitum* held by authority of law should not apply.

2. *Right of Resale on Executory Contract.*

§ 1645. **General considerations.**—The right of resale which has thus far been considered is that which attaches for the protection of the seller when the title to the goods has passed to the vendee, and it is to this class of cases alone that the right, strictly speaking, belongs. Such a right, however, is constantly asserted in cases in which the title to the goods has not passed, and the instances are numerous in which all of the optional remedies of the seller, heretofore alluded to, are declared to exist in this class of cases also. The two classes of cases, nevertheless, are clearly distinguishable, as will be obvious from a moment’s consideration. The right of resale is primarily a remedy for enforcing the seller’s lien, but the seller in the cases now under consideration can have no lien to enforce. The title to the goods is still in him, and no man can have a lien upon his own property. The seller cannot sell the goods as agent for the buyer for the same reason that the buyer is not the owner and therefore cannot authorize the sale.

¹ Arnold v. Carpenter (1889), 16 R. I. 560, 18 Atl. R. 174. ² 2 Schouler on Pers. Prop., § 547.

The seller, moreover, can have no *option* of treating the goods as his own, because, *ex hypothesi*, they are and have been always his property.

§ 1646. —. There are, of course, cases in which, though the title may not have passed at the time of the threatened default of the buyer, the seller may still so far proceed with performance on his own part as to vest the title in law in the buyer, and may then have for his protection all the remedies which exist in any case in which the title has been transferred. But such are not the cases now referred to, but simply those in which it is apparent that, at no stage in the negotiations, has the title passed into the buyer.

§ 1647. **Choice of remedies.**—If an attempt were to be made to compare the several remedies open to the choice of the seller in the case of the executory contract, the following would be the result: (1) If the nature of the case will admit of it, the seller may proceed to so far complete the performance on his own part as to transfer the title to the buyer, and may then avail himself of all of the remedies, either against the goods or against the buyer personally, which are appropriate to such a case. (2) He may treat the contract as broken by the buyer, before the passing of the title, and, keeping the goods, may sue the buyer for damages for the latter's breach of contract. (3) He may treat the contract as broken, as in the last instance, and may proceed to sell the goods for the purpose of ascertaining the damages to be sued for—those damages being, as will be seen hereafter, ordinarily the difference between what the buyer was to pay for them and what they can be sold for in the market. (4) In some cases he may treat the contract as rescinded and proceed upon that basis.

§ 1648. —. Of these four remedies, the only one to be considered in this subdivision of this chapter as a remedy against the goods is obviously the third, and the third is just as obviously only an incident to the second, which is a remedy

against the buyer personally — a class of remedies to be considered in the following chapter.

§ 1649. Nature of right of resale.—The remedy of the seller, where the title has not passed, being thus primarily a personal one for the recovery of damages, and those damages being, as already stated, ordinarily the difference between the contract price and the market value of the goods, it becomes material to show what that market value is. Two methods of proving this value are available to the plaintiff: (1) He may call witnesses, familiar with the market, to testify what the market value of the goods in question was at the time and place in issue, *i. e.*, what, in their opinion, the goods *would* have sold for, if they had been put upon the market. (2) He may himself proceed to sell the goods in the market, and may then show what, in fact, they *did* sell for.

The purpose of this sale by the vendor is to make evidence for himself of a matter of fact, rather than to rely upon what must otherwise be somewhat a matter of conjecture or opinion.

§ 1650. How resale should be made.—The seller, in these cases, is not bound to resell, in order to ascertain the value: he may either resell or rely upon other evidence of value, at his option. If he does resell, he must, in order to have the result available as evidence of value, pursue, in substance, the same course as that required of a vendor who sells to enforce his lien; that is, as stated in foregoing sections, he must sell in good faith, within a reasonable time, after notice¹ in the customary manner, and at the place of delivery, or, if there be no market there, then in the nearest and most available market.

¹That notice of the intention to resell is necessary, even on the executory contract, in order to make the price so obtained the basis of recovery, see *Davis Sulphur Ore Co. v. Atlanta Guano Co.* (1900), 109 Ga. 607, 34 S. E. R. 1011, and cases cited. That the seller must proceed with "due diligence," see *Gehl v. Milwaukee Produce Co.* (1900), 105 Wis. 573, 81 N. W. R. 666. See also *Tripp v. Forsaith Mach. Co.* (1897), 69 N. H. 233, 45 Atl. R. 746.

CHAPTER III.

REMEDIES OF THE SELLER AGAINST THE BUYER PERSONALLY.

§ 1651. Purpose of this chapter.

1652. What questions arise.

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1653. In general.

1. *Where the Goods have been Delivered.*

1654. Recovery of price the chief object.

1655. Seller cannot rescind for mere non-payment of price.

1656. — May rescind for fraud.

1657. — May reserve lien by contract.

1658. Seller may recover price as for goods sold and delivered.

1659. — When credit given.

1660. — When no credit given.

1661, 1662. When payment of price is due — On delivery.

1663. — At expiration of term of credit.

1664. — How when bill or note was to be given for the price.

1665. Actual delivery and acceptance necessary to sustain count for goods sold and delivered.

1666. Actions for deceit.

2. *Where the Goods have not been Delivered.*

1667. Title passing though goods not delivered.

1668. Recovery of price where seller yet to do something to the goods.

1669. Recovery of price where seller holds as bailee for buyer.

§ 1670, 1671. Recovery of price where seller claims his lien.

1672. Recovery of price where seller stops goods in transit.

1673. Recovery of residue of price after resale in pursuance of lien.

1674–1677. Recovery of price where buyer fails or refuses to take the goods.

1678, 1679. — Other remedies in like cases.

1680. — Vendor may resell and recover deficiency.

1681, 1682. — Right to keep property as his own and recover deficiency.

II. WHERE THE TITLE HAD NOT PASSED.

1683. In general.

1. *Where the Goods have been Delivered.*

1684–1688. Recovery of goods and damages for breach of contract.

2. *Where the Goods have not been Delivered.*

1689. Where title has not passed and goods not delivered, action for damages is remedy.

1690. Measure of damages usually difference between contract price and market price at time and place of delivery.

1691. — Time for delivery.

1692. — How market value shown — Resale.

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| <p>§ 1693. — Scope of evidence.</p> <p>1694. Full contract price after tender allowed in some cases.</p> <p>1695. — Contracts for sale of stocks.</p> <p>1696. — Contracts for manufacture of chattel.</p> <p>1697. — Contracts for production of that which has no market value.</p> <p>1698. — This not the general rule.</p> <p>1699. Countermanding performance of executory contract.</p> <p>1700. — Countermanding order after part delivery.</p> <p>1701. — Countermanding order for goods when partly manufactured.</p> | <p>§ 1702, 1703. — Countermanding order before manufacture begun.</p> <p>1704. — Loss of profits.</p> <p>1705. — Form of repudiation.</p> <p>1706. Effect on seller's rights of repudiation by the buyer.</p> <p>1707. — Seller not obliged to treat it as a present breach.</p> <p>1708. — Contract kept alive for the benefit of both parties.</p> <p>1709-1712. — Measure of damages if seller does treat it as present breach.</p> <p>1713. — Treating contract as rescinded and recovering <i>quantum valebat</i>.</p> |
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§ 1651. **Purpose of this chapter.**—In the preceding chapter there has been consideration of the remedies of the unpaid seller against the goods. It is the purpose of this chapter to treat of the remedies which the seller has, not against the goods, but against the buyer personally. These personal remedies in this case, as in most other cases, are ordinarily the primary ones, while the remedies against the goods are usually concurrent or collateral only and exist for the purpose of securing and protecting the others. In dealing with the subject here, questions of mere pleading and practice will in general be omitted, as involving matters largely of local law, and the consideration will be confined to the general rules of law which govern the subject.

§ 1652. **What questions arise.**—It will be obvious upon reflection that a variety of conditions may arise, the chief among which will perhaps be these:

I. The title has passed, and

(1) The goods have been delivered, or

(2) The goods still remain in the possession of the seller.

II. The title has not passed, and

(1) The possession has been surrendered temporarily to the buyer, or

(2) The goods still remain in the custody of the seller.

There may also be involved questions of deceit or fraud and a consequent power of rescission. There may also be rights of recaption or rescission reserved by the special agreement of the parties.

The chief distinction suggested between the cases in which the title has or has not passed, as modified by the further consideration of the change of possession, seems, however, to be most appropriate to the present purpose and will be adopted in this chapter.

I.

WHERE THE TITLE HAS PASSED.

§ 1653. **In general.**—As suggested in the preceding section, a distinction may well be drawn between those cases in which the goods have been delivered and those in which the goods still remain in the custody of the seller. For the purposes of a lien, this is obviously important; it is equally so from the standpoint of a possible recaption or rescission; and from the standpoint of the form of action the distinction is represented in the well known difference in the *common counts* between the count for *goods sold and delivered* and the count for *goods bargained and sold*.

1. *Where the Goods have been Delivered.*

§ 1654. **Recovery of price the chief object.**—If the title has passed and the goods have been delivered to the buyer, the seller's chief aim will, of course, be the recovery of the price, and the remedies which will coerce or secure payment will therefore be paramount. In this line it may be noticed first that —

§ 1655. **The seller cannot rescind merely for non-payment of the price.**—By the hypothesis, the title has passed and the goods have been delivered, and, unless he has expressly retained by contract some lien or option to rescind, his remedy lies in action only: he cannot rescind and recover his goods simply because the buyer does not pay when or as agreed.¹

¹ *Kramer v. Messner* (1897), 101 Iowa, 88, 69 N. W. R. 1142.

§ 1656. — **Seller may rescind for fraud.**—The seller may, of course, in many cases, if he has not waived his right, rescind the sale and recover his goods where the sale was brought about by fraud or deceit. That question has, however, been fully considered in a previous chapter,¹ and need not be repeated here.

§ 1657. — **Seller may reserve lien by contract.**—So, also, the seller may by contract have reserved a lien which will secure the price notwithstanding the transfer of the title and the delivery of the goods;² but the subject of contract liens is beyond the range of the present work, and must be found considered in treatises upon the law of liens and chattel mortgages, like the excellent books of Mr. Jones.³

Confining ourselves, then, to rights of action merely, it may be noticed first that —

§ 1658. **Seller may recover price as for goods sold and delivered.**—The simplest and most common case of all is the case in which the title has passed and the goods sold have, either actually or in contemplation of law, been delivered to the buyer. Here nothing remains to be done except the payment of the price, which is due either upon the delivery of the goods or at the expiration of the term of credit, if any; and, upon default in payment, the seller may sue the buyer for the price, as for goods sold and delivered.⁴

§ 1659. — **When credit given.**—In such a case, as has been seen, if credit has been given but no lien has been retained, and there is no warrant for the rescission of the sale, the seller's *only* remedy is this personal action against the buyer; and the measure of his recovery will be the price agreed upon, with interest from default. If no price has been agreed upon,

¹ See *ante*, § 886 *et seq.*

² See *ante*, § 577.

³ See Jones on Chattel Mortgages

(4th ed.); Jones on Liens.

⁴ See Chitty on Pleading (16th Am. ed.), *p. 356.

then the fair value — the reasonable value — measured by the market price, if any, will be the basis of recovery.¹

§ 1660. — When no credit given.—If, however, no credit were agreed upon, then, as has been seen, delivery and payment are presumed to be coincident; the delivery in such a case is in law deemed to be conditioned upon immediate payment, and if the buyer, having obtained possession of the goods, refuses to pay for them, in violation of this condition, the seller may either recover his goods,² or, waiving this right, may sue at once for the price.³

§ 1661. When payment of the price is due — On delivery. The general question, when the payment of the price is due, has already been considered in an earlier chapter,⁴ and the discussion need not be repeated here. It will suffice to recall what has been frequently observed, that, where no term of credit has been agreed upon, it is presumed that delivery and payment are to be concurrent acts, and the payment is therefore due at the time of the delivery of the goods at least.⁵

¹See *ante*, § 207; *Livingston v. Wagner* (1895), 23 Nev. 53, 42 Pac. R. 290; *Comstock v. Sanger* (1883), 51 Mich. 497, 16 N. W. R. 872; *Lovejoy v. Michels* (1891), 88 Mich. 15, 49 N. W. R. 901, 13 L. R. A. 770; *Greene v. Lewis* (1887), 85 Ala. 221, 4 S. R. 740, 7 Am. St. R. 42; *Shealy v. Edwards* (1892), 73 Ala. 175, 49 Am. R. 43; *McEwen v. Morey* (1871), 60 Ill. 32.

²See *ante*, § 554.

³See *ante*, § 549.

Recovery from sub-vendee.—Where personal property is sold for cash on delivery, the sale is conditional, and the title will not vest in the purchaser until the terms of the sale are complied with; and though, as a general rule, a bill of lading is evidence of title to personal property, yet if it be obtained without the authority of the owner and seller

of the goods, or by fraud, it will not authorize a transfer which will defeat the title of the original owner. *Evansville & Terre Haute R. Co. v. Erwin* (1883), 84 Ind. 457. So where such a conditional vendee, without the knowledge or consent of the seller and without compliance with the terms of the sale, resells such property to a third person, who converts it to his own use, such third person acquires no title as against the original seller and is liable to him for its value, or for the balance due him from his vendee on the agreed price. *Lanman v. McGregor* (1883), 94 Ind. 301.

⁴*Ante*, Book IV, ch. VIII, § 1404 *et seq.*

⁵See *ante*, § 1407. Where the goods are to be delivered in instalments as called for, payment is due as each

§ 1662. — It may, however, become due before an actual delivery in many cases; because, as has been seen, unless the seller is bound to send or carry the goods to the buyer, readiness and willingness to deliver are all that is necessary to enable the seller to recover the price,¹ and where the seller is to deliver at a particular place, a delivery there entitles him to a recovery of the price without proof of an actual acceptance by the buyer.² By express stipulation, moreover, payment may be due before the time for delivery has arrived or even before the transfer of the title.³ But as the present subdivision has to do with those cases only in which a delivery has taken place, nothing further need be considered here than the rule of payment upon delivery where no credit has been given and such payment has not been waived.

§ 1663. — **At expiration of term of credit.**— Where, however, a term of credit has been given, then, as has been seen,⁴ payment is not due until the term of credit has expired. Even if fraud were present, the action for the price is not, as has been seen,⁵ to be accelerated by that fact, though the seller by rescinding the sale might recover his goods, or their value, in an action for their conversion.

§ 1664. — **How when bill or note was to be given for the price.**— But if the term of credit were given upon the condition that the buyer should give a note or other security for the price, and the buyer, upon demand, refuses to give the note or security as agreed, the seller, while he may not per-

instalment is delivered. *Pineville Lumber Co. v. Thompson* (1891), 46 Minn. 502, 49 N. W. R. 204.

¹ See *ante*, § 1412.

² *Schneider v. Oregon Pac. R. Co.* (1890), 20 Oreg. 172, 25 Pac. R. 391 [citing *Nichols v. Morse*, 100 Mass. 523; *Pacific Iron Works v. Long Island R. Co.*, 62 N. Y. 272].

³ See *ante*, § 1415.

⁴ See *ante*, § 1410, and cases cited;

Galloway v. Holmes (1844), 1 Doug. (Mich.) 330.

⁵ See *ante*, § 1411, and cases cited. One who receives credit for goods in consideration of his agreement to do certain things, which he fails to do, may be sued for the price of the goods as though no credit had been given. *Wineman v. Walters* (1884), 53 Mich. 470, 19 N. W. R. 150.

haps maintain *assumpsit* for the goods sold until that credit has expired, may yet sue immediately for the breach of the special agreement, and recover as damages the whole value of the goods, less, perhaps, the interest for the stipulated period.¹

§ 1665. Actual delivery and acceptance necessary to sustain count for goods sold and delivered.—In order that there may be a recovery of the price in the form now under consideration, *i. e.*, on the count for goods sold and delivered, it is indispensable, according to a very recent case, that there be an actual delivery and acceptance of the goods free from the operation of the seller's lien. A mere tender will not suffice. "The plaintiff must prove not only such a delivery as will vest the property in the goods in the defendant, but such a delivery as will divest himself of all lien upon the goods, and enable the defendant to maintain trover for them without paying or offering to pay for them."²

§ 1666. Actions for deceit.—Instead of suing for the price as discussed in the preceding sections, and instead of rescinding the sale for fraud — often, indeed, because rescission is not feasible or possible,—the seller may in many cases maintain an action of tort against the buyer for fraudulent practices in inducing the sale. What the elements are which must be present to constitute fraud and which will sustain an action for deceit has been discussed in an earlier chapter,³ and need not

¹ *Hanna v. Mills* (1893), 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; *Foster v. Adams* (1888), 60 Vt. 392, 15 Atl. R. 169, 6 Am. St. R. 120; *Young v. Dalton* (1892), 83 Tex. 497, 18 S. W. R. 819 [citing *Hanna v. Mills*, *supra*; *Hays v. Weatherman*, 14 Ind. 341; *Rinehart v. Olwine*, 5 Watts & Serg. 162]; *Morgan v. Turner* (1893), 4 Tex. App. 192, 23 S. W. R. 284 [citing also *Clodfelter v. Hulett*, 72 Ind. 148; *Carnahan v. Hughes*, 108 Ind. 225, 9 N. E. R. 79]; *Osborne & Co. v. Bell* (1886), 62 Mich. 214, 28 N. W. R. 841.

See also *Kokomo Strawboard Co. v. Inman* (1892), 134 N. Y. 92, 31 N. E. R. 248.

² *Greenleaf v. Gallagher* (1900), 93 Me. 549, 45 Atl. R. 829, 74 Am. St. R. 371 [citing *Atwood v. Lucas*, 53 Me. 508; *Tufts v. Grewer*, 83 Me. 407, 22 Atl. R. 382; *Moody v. Brown*, 34 Me. 107; *Edwards v. Railroad Co.*, 54 Me. 105; *Means v. Williamson*, 37 Me. 556; *Pettengill v. Merrill*, 47 Me. 109; *Gooch v. Holmes*, 41 Me. 523, explaining *Merrill v. Parker*, 24 Me. 89].

³ See *ante*, §§ 866 *et seq.*, 886 *et seq.*

be repeated here. It will suffice to say that, where those elements are present, the defrauded seller may maintain his action in tort for the deceit, and recover damages for the injury so inflicted.¹

2. *Where the Goods have not been Delivered.*

§ 1667. **Title passing, though goods not delivered.**—As has been already seen, the title may pass at once, though the goods are not to be delivered until a later time. On the transfer of the title an *obligation* to pay the price will at once arise, though that payment may not be *due* until the delivery of the goods. Such delivery, moreover, may be postponed for a variety of reasons.

Among the causes which may thus operate to leave the goods in the custody of the seller, the most important perhaps are these: 1. Because, though the title has passed, the seller has yet to do something to the goods to fit them for delivery. 2. Because, though the title has passed, the goods remain in the possession of the seller as bailee for the buyer. 3. Because, though the title has passed, the seller retains possession by virtue of his vendor's lien. 4. Because, though the title has passed and the vendee ought to take the goods and pay for them, he refuses to do so or repudiates the contract.

§ 1668. **Recovery of price where seller yet to do something to the goods.**—In the first of these cases the obligation to pay would doubtless arise upon the transfer of the title, though the payment, in the absence of an express stipulation, would usually not be regarded as due until the thing to be done by the seller was performed. Circumstances, however, might clearly show that payment was to be due at once, though the act to be done was to be performed later; and express stipulations to that effect would, of course, be entirely competent. If so made due, the seller, upon default of payment by the purchaser, may maintain an action for the price as for goods bargained and sold.

¹ See *People v. Healy* (1889), 128 Ill. 9, 20 N. E. R. 692, 15 Am. St. R. 90.

§ 1669. Recovery of price where seller holds as bailee for buyer.—Cases of the second class would involve somewhat different considerations. If the title has passed, but the seller retains possession as bailee for the buyer, an obligation to pay would arise upon the transfer of the title, and, in the absence of agreement otherwise, payment would doubtless be deemed due at the time of the constructive delivery to the buyer and the assumption of the new attitude by the seller. Action might therefore be maintained for its recovery.¹

The seller, clearly, by virtue of his lien might insist upon payment before he surrendered the goods.

§ 1670. Recovery of price where seller claims his lien.—In the third case, where the seller is in possession by virtue of his lien, still different considerations arise. If a credit has been given which has not yet expired, no action can, of course, be maintained until that credit has expired. If no such credit were given, or if given had expired, an obligation to make immediate payment will arise, and the seller, though still in possession by virtue of his lien, may at once recover the price in an action for goods bargained and sold. As stated in a recent case, "there may be a bargain and sale of goods sufficient to transfer the title, and thus to support an action for goods bargained and sold, without any such delivery as will amount to a transfer of possession. The former is quite consistent with the vendor's retaining a lien for the price, and thus retaining possession until the price is paid."²

§ 1671. —. The same rule is stated in another case³ as follows: "Under a contract of sale, when the goods have been so

¹ *Armstrong v. Turner* (1878), 49 Md. 589.

² *Frazier v. Simmons* (1885), 139 Mass. 531, 2 N. E. R. 112 [citing *Morse v. Sherman*, 106 Mass. 430, 432; *Haskins v. Warren*, 115 Mass. 514, 533; *Safford v. McDonough*, 120 Mass. 290; *Arnold v. Delano*, 4 Cush. (Mass.) 33,

38; *Simmons v. Swift*, 5 B. & Cr. 857; 2 Kent's Com. 492].

³ *Mitchell v. Le Clair* (1896), 165 Mass. 308, 43 N. E. R. 117 [citing *Morse v. Sherman*, 106 Mass. 430; *Putnam v. Glidden*, 159 Mass. 47, 34 N. E. R. 81, 38 Am. St. R. 394; *White v. Solomon*, 164 Mass. 516, 42 N. E. R. 104, 30 L. R. A. 537].

appropriated and set apart [as to complete the sale and pass the title], the vendor has done that which by the terms of the agreement makes the whole consideration payable; and so long as he remains ready to do whatever else is to be done to give the vendee the benefit of his purchase, he is entitled to receive the agreed price without reduction on account of his retention of his lien upon the property."

§ 1672. Recovery of price where seller stops goods in transit.—For like reasons the seller may recover the price although he may have exercised his right to stop the goods in transit. The exercise of this right, as has been seen,¹ does not rescind the sale, but simply restores the seller to his possession and his lien. Neither does the insolvency of the buyer operate to rescind the sale. The seller *may*, as has been seen,² pursue his remedy of resale; but he is not obliged to do so. He may, in the language of Kent,³ "sue for and recover the price, notwithstanding he has actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment."

If the vendee has already paid part of the price, he cannot recover it because of such stoppage, though he is, of course, entitled to the benefit of it as an extinguishment *pro tanto* of the price.⁴

§ 1673. Recovery of residue of price after resale in pursuance of lien.—And so the seller who, in pursuance of his lien, has rightfully resold the goods may, as has been seen, recover of the buyer the residue due upon the price.⁵ But this, of course, presupposes that the seller's resale has been due and regular, for it is clear that a wrongful resale of the goods will defeat the seller's claim to the price.⁶

§ 1674. Recovery of price where buyer fails or refuses to take the goods.—The fourth case also is unlike the others. If the title has passed, and the seller has done all that is re-

¹ *Ante*, § 1523.

² *Ante*, § 1621 *et seq.*

³ 2 Kent's Com. 541; *Newhall v.*

⁴ *Newhall v. Vargas, supra.*

⁵ See *ante*, § 1643.

⁶ *Bowser v. Birdsell* (1882), 49 Mich. Vargass (1839), 15 Me. 314, 33 Am. Dec. 5, 12 N. W. R. 888.

quired to be done upon his part — has taken the goods to the specified place, if any,¹ or tendered them when tender is required,² or, as in the usual case where no such active performance is required, stands ready and willing to surrender the goods upon performance by the buyer,³ — and the buyer fails or refuses to take the goods and pay the price, an action as for goods bargained and sold may be maintained.⁴ An actual change of possession is not essential to sustain an action for goods bargained and sold if the title has been transferred.⁵

§ 1675. —. In accordance with this rule, though the contract were at first executory — as where the specific goods were not then ascertained, — still, unless repudiated before the time for performance has arrived, the seller, who has so appropriated the goods to the contract as to pass the title to them in accordance with the rules laid down in a preceding chapter,⁶ may recover the price as for goods bargained and sold.⁷

¹ *Schneider v. Oregon Pac. R. Co.* (1890), 20 *Oreg.* 172, 25 *Pac. R.* 391.

² See *ante*, § 1130.

³ *Middlesex Co. v. Osgood* (1855), 4 *Gray* (Mass.), 447.

⁴ *Scott v. England* (1844), 2 *Dowl. & L.* 520; *Morse v. Sherman* (1871), 106 *Mass.* 430; *Doremus v. Howard* (1852), 23 *N. J. L.* 390; *Lassing v. James* (1895), 107 *Cal.* 348, 40 *Pac. R.* 534; *Wood v. Michaud* (1896), 63 *Minn.* 478, 65 *N. W. R.* 963; *Unexcelled Fireworks Co. v. Polites* (1890), 130 *Pa. St.* 536, 18 *Atl. R.* 1058, 17 *Am. St. R.* 788; *Guillon v. Earnshaw* (1895), 169 *Pa. St.* 463, 32 *Atl. R.* 545.

⁵ "All that is necessary to enable a party to maintain an action for goods bargained and sold is that the property in the specific goods should have passed." *Scott v. England*, *supra*.

But in order that an action for the price shall be maintained it is indispensable that there shall have been such an actual or constructive deliv-

ery as will pass the title and vest the property in the purchaser. *McCormick Harv. Mach. Co. v. Balfany* (1899), 78 *Minn.* 370, 31 *N. W. R.* 10.

⁶ *Ante*, § 694 *et seq.*

⁷ *Mitchell v. Le Clair* (1896), 165 *Mass.* 308, 43 *N. E. R.* 117, where it is said: "Under a contract of sale, when the goods have been so appropriated and set aside, the vendor has done that which by the terms of the agreement makes the whole consideration payable; and so long as he remains ready to do whatever else is to be done to give the vendee the benefit of his purchase, he is entitled to receive the agreed price without deduction on account of his retention of his lien upon the property." Citing *Morse v. Sherman*, 106 *Mass.* 430; *Putnam v. Glidden*, 159 *Mass.* 17, 34 *N. E. R.* 81; *White v. Solomon*, 164 *Mass.* 516, 42 *N. E. R.* 104, 30 *L. R. A.* 537.

§ 1676. —. For like reasons, upon an executory contract to manufacture, grow or otherwise produce or procure goods, not repudiated before performance is due, the seller, upon so manufacturing or producing the goods as to pass the title to them within the rules previously laid down,¹ may recover the price as for goods bargained and sold.²

§ 1677. —. Even though the seller, as will be seen in the following section, might have the right to resell the goods, he is not obliged to do so: that remedy is optional, and if the seller prefers to sue for the price, he has an undoubted right to so proceed.³

§ 1678. — **Other remedies in such cases.**—The remedy by action for the price is, however, not the only one of which the seller may avail himself in such a case. As has been seen, it is often said that the seller has his choice of three.⁴ To repeat what has so frequently been quoted, these are said to be the remedies of the seller:

“(1) He may store or retain the property for the vendee, and sue him for the entire purchase price.

“(2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or,

“(3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price.”⁵

§ 1679. —. This grouping of remedies, however, can scarcely be said to be accurate, either in the case of the exe-

¹ See *ante*, § 754 *et seq.*

² See the cases cited in the sections last referred to, especially *Shawhan v. Van Nest* (1874), 25 Ohio St. 490, 18 Am. R. 313; *Mechem's Cas. on Damages*, 262. See also *Black River Lumber Co. v. Warner* (1887), 93 Mo. 374, 6 S. W. R. 210; *McCormick Harvesting Mach. Co. v. Markert* (1899), 107 Iowa, 340, 78 N. W. R. 33.

³ *Lassing v. James* (1895), 107 Cal. 348, 40 Pac. R. 534 [citing *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. R. 544; *Dustan v. McAndrew*, 44 N. Y. 72; *Van Horn v. Rucker*, 33 Mo. 391, 84 Am. Dec. 52].

⁴ See *ante*, § 1618.

⁵ *Dustan v. McAndrew* (1870), 44 N. Y. 72, 78.

cuted or the executory sale. It is true enough, as it has been the purpose to show thus far in the present chapter, that if the title has passed and the seller has done all that is incumbent upon him to do, he may recover the price as for goods bargained and sold at least, even though the vendee has never received the goods into his actual possession and refuses to do so. Under these circumstances, the first of the rules given may appropriately be applied.¹

§ 1680. — Vendor may resell and recover deficiency.— So, if the title has passed but the seller still has the goods in his possession, he may, by virtue of his vendor's lien, resell the goods as the goods of the buyer (though not necessarily as the buyer's agent²), and recover as damages the difference between the contract price and the price obtained on such resale.³

§ 1681. — Right to keep property as his own and recover deficiency.— But as to the third rule the right is not so clear. By the hypothesis, the title has passed to the buyer and the goods are his, though they may remain in the possession of the seller. By virtue of what authority or right, then, may the seller, upon the mere default of the buyer, *rescind* the sale, keep the property as his own, and then recover the difference between the market value and the agreed price? If the title has not passed, the difficulty disappears; but the title has passed. May the seller treat the repudiation of the contract by the buyer, not as a ground for a total repudiation by himself, but as sufficient reason for a repudiation in part — that is, for a repudiation of the transfer of the title but a retention of the contract as a means for recovering damages for its breach? May the seller treat the rejection of the title by the buyer as

¹ But if the seller elects to store the goods as the goods of the buyer and then sue for the price, he must exercise his election and give notice of it to the buyer within a reasonable time. *Morris v. Cohn* (1891), 55 Ark. 401, 18 S. W. R. 384.

² See *ante*, § 1629.

³ See *ante*, § 1643; *Hayes v. Nashville* (1897), 47 U. S. App. 713, 26 C. C. A. 59, 80 Fed. R. 641; *Sands v. Taylor* (1810), 5 Johns. (N. Y.) 395, 4 Am. Dec. 374.

a ground for revesting it in himself and then proceed as though the contract were executory?

§ 1682. — Neither one of these things seems to be consistent with legal principles, but that something of this sort may occur seems constantly to be asserted by the courts;¹ and it is said to be the general rule in this country that “the seller upon the buyer’s default—whether the latter is insolvent or not, and whether his conduct is such as to show a settled determination to repudiate the contract or not, may, although title has passed to the buyer, elect to keep the property as his own and recover damages for the buyer’s breach.”² The English rule is otherwise.³

II.

WHERE THE TITLE HAD NOT PASSED.

§ 1683. *In general.*—Passing now to the case in which the title has not passed at the making of the contract or by virtue of it, somewhat different considerations apply. In these cases usually the possession will remain in the seller, but it may pass to the buyer although the title remains in the seller; and the same subdivision adopted in the preceding sections may therefore be appropriate here, namely, the remedies (1) where the goods have been delivered, and (2) where the goods have not been delivered.

1. *Where the Goods have been Delivered.*

§ 1684. *Recovery of goods and damages for breach of contract.*—Where the goods have been delivered but the title has not passed at the time the remedy is sought, it is obvious that

See *Hayden v. Demets* (1873), 53 Gratt. 785, 98 Am. Dec. 737; *Holland v. Rea*, 48 Mich. 218, 224; *Cook v. Brandeis*, 3 Metc. (Ky.) 555; *Bagley v. Findlay*, 82 Ill. 524; *Ames v. Moir* (1889), 130 Ill. 582, 22 N. E. R. 535; *Young v. Mertens* (1867), 27 Md. 114; *Barr v. Logan* (1848), 5 Harr. (Del.) 52.
² *Burdick on Sales*, p. 243.
³ *Martindale v. Smith* (1841), 1 Ad. & El. (N. S.) 389, 41 Eng. Com. L. 592.

the seller may be desirous of accomplishing one of two results, namely: either to recover the price, if possible, and let the title pass, or, on the other hand, to recover possession of his goods and obtain damages for the breach of contract.

§ 1685. —. His right to regain possession of the goods will depend upon the terms of the arrangement under which the buyer acquired possession. Usually this will be some form of a sale upon condition, and what these forms may be and what are the remedies of the seller under them are questions already considered in a previous chapter.¹

§ 1686. —. The personal remedy of the seller against the buyer will depend upon a variety of circumstances. He may in some cases, as has been seen, sue for and recover the price, waiving his right to a restoration of the chattel and permitting the title to vest in the buyer. This general subject has been already sufficiently discussed.²

§ 1687. —. He may, by express stipulation, be entitled to the price before the title passes, leaving the buyer to the personal agreement and responsibility of the seller.³

§ 1688. —. Where neither of these conditions is present, and the seller cannot or does not by the tender of the title vest it in the buyer,⁴ no action for the price can be maintained,⁵ but the seller may recover damages for the breach of the buyer's agreement to buy and pay for the chattel. These damages will usually be the difference between the contract price and the market value of the chattel at the time and place of the breach,—a matter which will be more fully considered in the following sections.⁶

¹ See *ante*, §§ 538 *et seq.*, 558 *et seq.*

² See *ante*, § 619 *et seq.*

³ *White v. Solomon* (1895), 164 Mass. 516, 42 N. E. R. 104, 30 L. R. A. 537.

⁴ See *post*, § 1694.

⁵ See, for example, *McCormick Harv. Mach. Co. v. Balfany* (1899), 78 Minn. 370, 81 N. W. R. 10.

⁶ See *post*, § 1690.

2. *Where the Goods had not been Delivered.*

§ 1689. Where title has not passed and goods not delivered, action for damages is remedy.—Where, however, before the title has passed or the goods have been delivered—and also where, though the title had passed, the law permits the vendor to treat the contract as rescinded and the title as revested in himself,—the remedy of the seller for the buyer's neglect or refusal to accept the goods and pay for them is, not an action for the price, but an action to recover damages for the breach of contract.

§ 1690. Measure of damages usually difference between contract price and market price at time and place of delivery.—The measure of the damages which the seller is thus entitled to recover is usually the difference between the contract price and the market value at the time and place of delivery.¹

¹ *Tufts v. Bennett* (1895), 163 Mass. 398, 40 N. E. R. 172 [citing *Barry v. Cavanagh*, 127 Mass. 394; *Whitney v. Boardman*, 118 Mass. 242; *Clement & Hawkes Mfg. Co. v. Meserole*, 107 Mass. 362; *Cutting v. Grand Trunk Ry. Co.*, 13 Allen (Mass.), 381; *Valpy v. Oakeley*, 16 Q. B. 941; *Bigelow v. Legg*, 102 N. Y. 652; *Unexcelled Fireworks Co. v. Polites*, 130 Pa. St. 536, 17 Am. St. R. 788; *Grand Tower Co. v. Phillips*, 23 Wall. (U. S.) 471; *Atwood v. Lucas*, 53 Me. 508]; *Jones v. Jennings* (1895), 168 Pa. St. 493, 32 Atl. R. 51; *Funke v. Allen* (1898), 54 Neb. 407, 74 N. W. R. 832, 69 Am. St. R. 716 [questioning *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. R. 480, and citing *Hale v. Hess*, 30 Neb. 42; *Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667, 65 N. W. R. 513; *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. R. 848; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. R. 348; *Browning v. Simons*, 17 Ind. App. 45, 46 N. E. R. 86; *Lawrence Canning Co. v. Lee*

Mercantile Co., 5 Kan. App. 77, 48 Pac. R. 749; *Miller v. Burch* (Ky.), 41 S. W. R. 307; *Heiser v. Mears*, 120 N. C. 443, 27 S. E. R. 117]; *Guillon v. Earnshaw* (1895), 169 Pa. St. 463, 32 Atl. R. 545; *Cahen v. Platt* (1877), 69 N. Y. 348, 25 Am. R. 203; *Murray v. Doud* (1897), 167 Ill. 368, 47 N. E. R. 717, 59 Am. St. R. 297; *Tahoe Ice Co. v. Union Ice Co.* (1895), 109 Cal. 242, 41 Pac. R. 1020; *Yellow Poplar Lumber Co. v. Chapman* (1896), 20 C. C. A. 503, 74 Fed. R. 444; *Schram v. Boston Sugar Ref. Co.* (1888), 146 Mass. 211, 15 N. E. R. 571; *Pittsburgh, etc. R. Co. v. Heck* (1875), 50 Ind. 303, 19 Am. R. 713.

Incidental expenses.—The seller cannot, by any act of his, enhance these damages. He cannot charge the buyer with storage or taxes or the costs of the resale. *Tripp v. Forsaith Mach. Co.* (1897), 69 N. H. 233, 45 Atl. R. 746. As to "commissions" for resale, they certainly cannot be recovered if they have not been paid.

If there be no market at that place, then the value at the nearest available market furnishes the basis, less the cost of transportation.¹

If no evidence of such market value is given, nominal damages only can be recovered;² and this, of course, would be the extent of the recovery if there were no excess of the contract price over the market value.³

§ 1691. — Time for delivery.— Where the contract fixes the time for delivery, that time will usually control. If the time for delivery has been postponed at the request of the buyer, then the market value at the postponed time furnishes the basis.⁴ If no time were fixed, then, as has been seen,⁵ a rea-

Gehl v. Milwaukee Produce Co. (1900), 105 Wis. 573, 81 N. W. R. 666.

¹ Thus, in *Barry v. Cavanagh* (1879), 127 Mass. 394, where there was default by the purchaser in taking paving stones at a place named — Dover Street Bridge, near Boston — where there was no market, and Boston was the nearest market, the court said: "The plaintiffs, if entitled to recover, were entitled to such sum in damages as would put them in as good condition as if the defendants had fulfilled their contract. That is to say, they ought to have such sum of money as, added to the value of the goods where they lay, would put them into the same financial condition as if the defendants had accepted them and paid the contract price for them. Now, if, when they were brought to Dover Street Bridge, where there was no market for them, it would cost all they would sell for at a market to carry them to the market, they were valueless there, and they would be entitled to recover the contract price in order to be made whole. If they [the stones] could be conveyed to a market for a part of what they would sell for,

they were worth at the bridge the market price less the cost of getting them to the market, and the true rule would be the difference between what they were so worth and the contract price. Stated otherwise, if they were salable where they lay, to be delivered elsewhere at a price larger than the cost of delivery there, the excess of such price above the cost of delivery was the market value, which should have been deducted from the contract price, in order to get at the damages."

Where the buyer controls the market at the time and place of delivery, then also the measure is the difference between the contract price and the market price at the nearest available market, less the cost of transportation to that market. *Yellow Poplar Lumber Co. v. Chapman* (1896), 20 C. C. A. 503, 74 Fed. R. 444.

² *Tufts v. Bennett* (1895), 163 Mass. 398, 40 N. E. R. 172.

³ *Foos v. Sabin* (1877), 84 Ill. 564.

⁴ *Hickman v. Haynes* (1875), L. R. 10 Com. Pl. 598. Accord: *Ogle v. Lord Vane* (1868), L. R. 2 Q. B. 275, 3 id. 272.

⁵ See *ante*, § 1129.

sonable time will be presumed, and the buyer's refusal to take the goods when tendered within a reasonable time will charge him with the liability.¹

§ 1692. — **How market value shown — Resale.**— What this market value is may ordinarily be shown by any competent evidence. It seems to be thought at times that the vendor *must* resell the goods, and that he does so in some sense as the agent of the vendee; but this is not true: the title to the goods by the hypothesis is still in the seller, and he may resell them or not as he chooses. If he does resell, he does so for the purpose of making evidence for himself and not as agent of the buyer.² Without reselling, he may show the market value by the opinion of those familiar with the facts;³ or, by reselling, under proper circumstances and within a reasonable time, he may establish what the market value of the goods in question actually was at the time in controversy.⁴

§ 1693. — **Scope of evidence.**— “Evidence as to the price,” it is said in a well-considered case,⁵ “need not be confined to the precise time when the contract was to have been performed. It may sometimes be impracticable to show the price at the precise time, and hence evidence of the price for a brief period before and after the time may be given, not for the purpose of establishing a market price at any other time, but for the pur-

¹See Mayne on Damages (6th ed.), 185. Where the goods are to be delivered when the buyer gives notice that he is ready to receive them, he is bound to give such notice within a reasonable time: and if he fails to do so, the seller may offer to deliver the goods without such notice and the purchaser is bound to accept and pay the price. *Sanborn v. Benedict* (1875), 78 Ill. 309.

²See *Moore v. Potter* (1898), 155 N. Y. 481, 50 N. E. R. 271, 63 Am. St. R. 692, more fully referred to *ante*, §§ 1629, 1630.

³*Girard v. Taggart* (1819), 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Andrews v. Hoover* (1839), 8 Watts (Pa.), 239; *Graham v. Maitland* (1869), 6 Abb. (N. Y.) Pr. (N. S.) 327, 37 How. Pr. 307.

⁴See *ante*, § 1643. Must act with due diligence. *Gehl v. Milwaukee Produce Co.* (1900), 105 Wis. 573, 81 N. W. R. 666.

⁵*Cahen v. Platt* (1877), 69 N. Y. 348, 25 Am. R. 203 [citing *Dana v. Fiedler*, 12 N. Y. 40; *Dustan v. McAndrew*, 44 N. Y. 72; *Durst v. Burton*, 47 N. Y. 167].

pose of showing as well as practicable the market price on the day the contract was to have been performed. So it may not always be practicable to show the price at the precise place of delivery. There may have been no sales of the commodity there, and hence evidence of the price at places not distant, or in other controlling markets, may be given, not for the purpose of establishing a market price at any other place, but for the purpose of showing the market price at the place of delivery."

§ 1694. Full contract price after tender allowed in some cases.—There are, indeed, authorities which permit the seller, upon a tender of performance and a constructive delivery of the goods to the buyer, to recover the full price notwithstanding the buyer's refusal to receive them;¹ but as applied to chattels generally which have a market value, the weight of authority is in favor of the allowance of damages only.²

§ 1695. — Contracts for sale of stocks.—The rule permitting a recovery of the price has, in Massachusetts and elsewhere, been applied "to contracts for the sale of stock in corporations, where the vendor has before trial duly tendered the stock or offered to transfer it, and has renewed the tender or offer in court at the trial."³

§ 1696. — Contracts for manufacture of chattels.—So, also, as has been seen, upon a contract for the manufacture of

¹See *Webber v. Minor* (1869), 6 Bush (Ky.), 463, 99 Am. Dec. 688 [though mere tender was here held not enough]; *Lincoln Shoe Mfg. Co. v. Sheldon* (1895), 44 Neb. 279, 62 N. W. R. 480 [overruled on this point by *Funke v. Allen* (1898), 54 Neb. 407, 74 N. W. R. 832, 69 Am. St. R. 716]; *Black River Lumber Co. v. Warner* (1887), 93 Mo. 374, 6 S. W. R. 210 [though the court said that it was not prepared to say that the rule should be applied in cases of sales of ordinary goods, wares and merchandise];

Crown Vinegar Co. v. Wehrs (1894), 59 Mo. App. 493; *Mitchell v. Le Claire* (1896), 165 Mass. 308, 43 N. E. R. 117.

²*Funke v. Allen*, *supra*; *White v. Solomon* (1895), 164 Mass. 516, 42 N. E. R. 104, 30 L. R. A. 537.

³Per Field, C. J., in *White v. Solomon*, *supra*, citing *Thorndike v. Locke*, 98 Mass. 340; *Pearson v. Mason*, 120 Mass. 53; *Thompson v. Alger*, 12 Metc. 428, 443. So also in *Lincoln Shoe Mfg. Co. v. Sheldon*, *supra*.

a chattel it has been held in many cases that the title passes when the article has been produced and tendered to the other, and the full contract price may therefore be recovered, the chattel being regarded as the property of the buyer.¹

§ 1697. — Contract for production of that which has no market value.— And so in cases of contracts for the manufacture or production of that which has no market value, as, for example, a portrait, a bust, an article of wearing apparel suited only to the person for whom it was designed, a model for an invention, a patented article, which is of value only to the person ordering it, if to any one, and the material in which has been rendered valueless for any other use, it is held, and properly, that the contract price may be recovered.²

¹ See *ante*, § 754 *et seq.*, where this subject is discussed. In accordance with this view, it is said in *Black River Lumber Co. v. Warner* (1887), 93 Mo. 374, 6 S. W. R. 210, "where the subject-matter of the contract is a specific chattel to be manufactured by the vendor for the vendee, and the vendor has completed his contract and performed all that the contract requires him to do, it is but just and fair that his damages, in case of a refusal of the vendee to accept the article, should be the contract price. The vendor will, of course, in such case, hold the property for the vendee." Citing *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. R. 313; *Mechem's Cas. on Damages*, 262; *Ballentine v. Robinson*, 46 Pa. St. 177; *Smith v. Wheeler*, 7 Oreg. 49.

So in *McCormick Harv. Mach. Co. v. Markert* (1899), 107 Iowa, 340, 78 N. W. R. 33, the court, quoting from *Moline Scale Co. v. Beed* (1879), 52 Iowa, 307, 35 Am. R. 272, says that the rule in these cases is that "when everything has been done by the

vendor which he is required by his contract to do, and the manufactured property, in its completed condition, is tendered to the purchaser and he refuses to receive it, and it is held by the vendor for the purchaser, the vendor may recover the contract price." The result of the judgment, adds the court, "in such cases would be to vest in the purchaser the title to the property."

² So held, for example, in *Allen v. Jarvis* (1849), 20 Conn. 38, where the court said: "The rule of damages, in an action for the non-acceptance of property sold or contracted for, is the amount of the actual injury sustained by the plaintiff in consequence of such non-acceptance. This is, ordinarily, the difference between the price agreed to be paid for it and its value, where such price exceeds its value. If it is worth that price, the damages are only nominal. But there may be cases where the property is utterly worthless in the hands of the plaintiff, and there the whole price agreed to be paid should be recovered. The present appears to us

§ 1698. — **This not the general rule.**—But “in an ordinary contract of sale,” as is said by the court in Massachusetts,¹ “the payment and the transfer of the goods are to be concurrent acts, and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due, from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods.”

§ 1699. **Countermanding performance of executory contract.**—As has been already seen,² one party to an executory contract has always the right, subject to the obligation to pay damages to the other, to stop the performance of the contract whenever for any reason he deems it to his interest to terminate it, and the other party is not at liberty to proceed thereafter with the performance in order to enhance the damages to be paid.³

to be a case of this description. The articles contracted for were those for the exclusive right of making and vending which the defendant had obtained a patent. They could not be lawfully sold by the plaintiffs; and were therefore worthless to them in the form in which they were when they were to be received by the defendant. And there is no evidence to show that the materials of which they were made could be converted to any other useful purpose. We do not think that, under these circumstances, the defendant can justly require us to set aside the verdict because the jury have given the full amount which he agreed to pay.” To

same effect: *Marshall v. Macon County Savings Bank* (1891), 108 N. C. 639, 13 S. E. R. 182.

¹ Per Holmes, J., in *White v. Solomon* (1895), 164 Mass. 516, 42 N. E. R. 104, 30 L. R. A. 537. See the discussion in *Morris v. Cohn* (1891), 55 Ark. 401, 18 S. W. R. 384. See also the many cases cited under the general rule, *ante*, § 1407.

² See *ante*, § 1091.

³ *Clark v. Marsiglia* (1845), 1 Den. (N. Y.) 317, 43 Am. Dec. 670; *Davis v. Bronson* (1891), 2 N. Dak. 300, 50 N. W. R. 836, 33 Am. St. R. 783, 16 L. R. A. 655, and many other cases cited in the section above referred to.

§ 1700. — Countermanding order after part delivery.—

Where, therefore, after delivery and acceptance in part, the buyer refuses to accept the residue, the seller, if the contract is entire, may doubtless deem the refusal as a repudiation of the whole contract and repudiate on his own part as to that already delivered; or he may treat it as severable, in which case the seller is entitled to the contract price for that delivered and to damages for the refusal to accept the residue. Subject to the qualifications already mentioned, those damages, as has been seen, will be the difference between the contract price and the market price at the time and place of delivery agreed upon.

§ 1701. — Countermanding order for goods when partly manufactured.— So where there has been an order for goods to be manufactured, and before their manufacture is complete the buyer countermands the order, the seller, as has been seen,¹ is not usually at liberty to proceed to complete them on the buyer's account;² but, accepting the countermand as a breach

¹ See *ante*, § 1091.

² In *Southern Cotton Oil Co. v. Heflin* (1900, U. S. App.), 99 Fed. R. 339, 39 C. C. A. 546, the plaintiff was a manufacturer of cotton-seed products, and made a contract with defendant to sell to him all the cake and meal to be produced by its mill during the year. After receiving part of it, the defendant gave notice that he would receive no more, but the plaintiff continued to manufacture it, and tendered the balance, which was refused. The court held that "when the defendant gave notice that he would not receive the meal, he could not have complained if the plaintiff had acted upon the notice and sued him at once. But he could not require the plaintiff to recede from its contract. The plaintiff had a vested right in the contract to deliver the meal sold at the time fixed by the agreement, and no notice of the de-

fendant could deprive it of this right." The measure of damages was declared to be the difference between the contract price and the market price, and in support of this rule the court said: "The plaintiff was not making one product only; it was making several, obtained from the same perishable raw material. All were made for sale. The meal sold to the defendant was not the chief product. When notified by the defendant that he would not take the meal, the plaintiff could not quit making it without stopping the mill and abandoning its business of making other products. To do this the plaintiff would violate its other contracts as to oil, hulls and lint. The case is not analogous to a contract to make a soda-water apparatus, as in *Tufts v. Lawrence*, 77 Tex. 526, where only one chattel and two contracting parties are concerned; nor is it

of the contract, the seller may recover the damages which he has sustained by reason of not being permitted to complete the contract. In such a case he cannot sue for work and labor done and materials furnished, because the materials are his own and the labor has been expended on his own materials.¹ He has lost the profit he would have made had he been permitted to complete the contract, and if the value of that which is completed is less than the cost for material and labor to produce it, he has lost that in addition. Compensation for these two items should be the measure of his damages.²

§ 1702. — Countermanding order before manufacture begun.— Where, however, before the manufacture is begun the buyer countermands the order or repudiates the contract, the seller is not at liberty to proceed to complete the goods for the purpose of enhancing the damages,³ nor will he be permit-

strictly analogous to a contract to manufacture corn shellers, as in *Kingman & Co. v. Western Mfg. Co.*, 34 C. C. A. 489, 92 Fed. R. 486, where only one thing is being produced out of the same raw material. . . . The courts may say in some cases that the work should be stopped on notice by one party of an abandonment of the contract, but in a case like the present one it would be impossible to fairly apply such a rule."

¹ *Hosmer v. Wilson* (1859), 7 Mich. 294, 74 Am. Dec. 716; *Mechem's Cas. on Damages*, 269; *Unexcelled Fireworks Co. v. Polites* (1890), 130 Pa. St. 536, 18 Atl. R. 1058, 17 Am. St. R. 788.

² As stated in *Southern Cotton Oil Co. v. Heflin* (1900), 39 C. C. A. 546, 99 Fed. R. 339, the measure of the damages to be recovered by the seller "is (1) his outlay and expenses, less the value of materials on hand; (2) the profits he might have realized by

performance. The first item he may recover in all cases. The second he may recover when the profits are the direct fruit of the contract and not too remote or speculative."

It is true that it is said in *Tufts v. Lawrence* (1890), 77 Tex. 526, 14 S. W. R. 165, and *Heiser v. Mears* (1897), 120 N. C. 443, 27 S. E. R. 117, that the measure of damages is the difference between the contract price and the value of the goods at the time of repudiation, but this is obviously unsound. Under such a rule, the less the seller has done towards performance the more he can recover.

³ *Ante*, § 1092; *Hosmer v. Wilson* (1859), 7 Mich. 294, 74 Am. Dec. 716; *Mechem's Cas. on Damages*, 269; *Danforth v. Walker* (1864), 37 Vt. 239; *Dillon v. Anderson* (1870), 43 N. Y. 231; *Unexcelled Fireworks Co. v. Polites* (1890), 130 Pa. St. 536, 18 Atl. R. 1058, 17 Am. St. R. 788.

ted, by completing and tendering them, to recover the contract price.¹ His remedy is an action for the damages he has sustained by reason of not being permitted to complete the contract, and the measure of his damages will be the difference between the cost of manufacturing or producing the goods and the price he was to receive for them,² "making reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract."³

§ 1703. —. The same rule also was applied where there had been a contract to manufacture and supply goods as ordered by the buyer, and the buyer, after receiving and paying for part, refused to receive any more.⁴ The court, indeed, attached much importance to the fact that the goods were of a perishable nature, so that if made they might not endure until a market could be found, and for this reason held that the ordinary rule allowing the difference between the contract and the market price should not apply. The case, however, seems not in need of such distinction to bring it within the rule laid down in the preceding section.

§ 1704. — **Loss of profits.**— If it be urged, as it sometimes is, that this rule operates to give the plaintiff damages for a loss

¹ Tufts v. Weinfeld (1894), 88 Wis. 647, 60 N. W. R. 992.

² Hincley v. Pittsburgh Steel Co. (1886), 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. R. 875; Mechem's Cases on Damages, 272; Chapman v. Kansas City, etc. Ry. Co. (1898), 146 Mo. 481, 48 S. W. R. 646; Black River Lumber Co. v. Warner (1887), 93 Mo. 374, 6 S. W. R. 210; American Bridge Co. v. Bullen Co. (1896), 29 Oreg. 549, 46 Pac. R. 138; Williams v. Crosby Lumber Co. (1896), 118 N. C. 928, 24 S. E. R. 800; Tufts v. Weinfeld (1894), 88 Wis. 647, 60 N. W. R. 992; Muskegon Curtain Roll Co. v. Keystone Mfg. Co.

(1890), 135 Pa. St. 132, 19 Atl. R. 1008; Kingman v. Hanna Wagon Co. (1898), 176 Ill. 545, 52 N. E. R. 328.

Contract price not fixed — "Lowest jobbing prices."— Where the price to be paid is not fixed by the contract, but is to be the "lowest jobbing price," then the measure will be the difference between such price and the cost of production. Beardsley v. Smith (1895), 61 Ill. App. 340.

³ United States v. Speed (1868), 75 U. S. (8 Wall.) 77.

⁴ Todd v. Gamble (1896), 148 N. Y. 382, 42 N. E. R. 982.

of profits, it is to be replied that a loss of profits is always a proper subject for compensation if such a loss of profits can be shown with reasonable certainty and without resorting to speculation or conjecture.¹ As said by the supreme court of the United States,² "it by no means follows that profits are not to be allowed, understanding, as we must, the term 'profits' as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*. And in a case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Whenever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost."

§ 1705. — **Form of repudiation.**— It is not always necessary that the buyer shall, in express terms, repudiate the contract or countermand the order. Such a result may be inferred from his conduct; and where, by the contract, he is to do the first act, as, for example, to give instructions as to the manner of manufacture or to furnish the necessary directions for ship-

¹ *Masterton v. Mayor of Brooklyn* (1845), 7 Hill (N. Y.), 61, 42 Am. Dec. 38; *Mechem's Cases on Damages*, 141. quoted with approval in *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, *supra*. To same effect: *Tahoe Ice Co. v. Union Ice Co.* (1895), 109 Cal.

² *Philadelphia, etc. R. Co. v. Howard* (1851), 54 U. S. (13 How.) 307, 242, 41 Pac. R. 1020, and cases cited.

ment, his failure or refusal to do this may be equivalent to a repudiation.¹

§ 1706. Effect on seller's rights of repudiation by the buyer.—As has been seen in a previous chapter,² it is not within the power of the vendee to put an end to the contract without the concurrence of the seller. The latter, if he will, may acquiesce in the buyer's act so far as to treat it as a present termination and pursue his remedies as for a present breach.³ Delivery or even tender of the goods is not necessary where the buyer has thus declared his intention not to receive them.⁴

§ 1707. — Seller not obliged to treat it as a present breach.—But, as has also been seen,⁵ the seller is not obliged to regard the buyer's repudiation as a present breach. He may not, indeed, thereafter proceed to do more in order to enhance his damages, but he may treat the contract as in force until the time fixed for its performance has arrived, and then have his damages ascertained as though the contract had been broken on that date.⁶

¹ See *Weill v. American Metal Co.* (1899), 182 Ill. 128, 54 N. E. R. 1050; *Hinckley v. Pittsburgh Steel Co.* (1887), 121 U. S. 264; *Mechem's Cas. on Damages*, 272.

² See *ante*, § 1088.

³ See *Roehm v. Horst* (1900), 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. R. 780, quoted fully in notes to § 1089, *ante*, where other cases will be found fully collected.

⁴ *Pancake v. Campbell* (1897), 44 W. Va. 82, 28 S. E. R. 719; *Morris v. Cohn* (1891), 55 Ark. 401, 18 S. W. R. 384.

⁵ See *ante*, § 1088.

⁶ See *Kadish v. Young* (1883), 108 Ill. 170, 48 Am. R. 548; *Mechem's Cas. on Damages*, 265; *Roebing Sons Co. v. Lock Stitch Fence Co.* (1889), 130 Ill. 660, 22 N. E. R. 518.

Kadish v. Young (1883), 108 Ill. 170,

supra, was an action of *assumpsit* by Young and another against Kadish and another to recover damages for the breach of a contract whereby appellees, on the 15th of December, 1880, sold to appellants one hundred thousand bushels of barley at \$1.20 per bushel, to be delivered and paid for at such time during the month of January, 1881, as appellees should elect. On the next day after the contract was made the appellants gave notice to the appellees that they would not receive the barley and comply with the terms of the contract. The appellees, however, refused to consider the contract broken, and on the 12th of January they tendered to appellants the one hundred thousand bushels of barley, which tender was refused. Within a reasonable time thereafter the ap-

§ 1708. — Contract kept alive for benefit of both parties.—If, however, the seller elects to treat the contract as

appellees sold the barley upon the market and brought this action on the contract, claiming as their measure of damages the difference between the contract price and the value of the barley in the market on the day when it was to have been delivered by the terms of the contract. It was claimed on the part of the appellants that in case of such a contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract as shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. But the court held that a buyer cannot thus create a breach, before the time for performance arrives, upon which the seller is bound to act, and if the buyer's declaration is ineffectual to create a breach it follows that the seller is under no obligation to regard it for any purpose. "Nothing would seem to be plainer," say the court, "than that, while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley

ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January."

In *Roebling's Sons Co. v. Lock Stitch Fence Co.* (1889), 130 Ill. 660, 22 N. E. R. 518, *supra*, a contract was made between appellant and appellee, by the terms of which the former agreed to sell to the latter five hundred tons of fence-wire, and to deliver the wire so sold between March 7, 1885, and July 1, 1885. On April 29th the appellee definitely repudiated the contract by telegraphing appellant that no more wire would be taken even if it were shipped. The appellant, however, refused to relinquish the contract, and proceeded with the manufacture and tender of the residue of the wire. The court held that the appellant had a right to do so, and to hold the appellee responsible for refusal to accept tender. "Where one party to a contract," said the court, "gives notice, before the time of performance arrives, that he does not intend to perform, the other party may treat such notice as a breach and

still in force, he will do so, as has been seen,¹ for the benefit of the buyer as well. The latter will, in general, be entitled to

bring his action; or he may decline to accept such notice as a breach, and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. One party to a contract cannot, by simply refusing to carry out his part of it, compel the other party to rescind it."

In *Roth & Co. v. Taysen & Co.* (1896) [Q. B. Div.], 73 Law Times Reports, 628, the plaintiffs had contracted to sell to defendants a cargo of maize, to be shipped from South America according to certain specifications. It was expected to arrive, and actually did so, on September 5th. On the 28th of May preceding, there being a declining market, the buyers telegraphed the sellers repudiating the contract. An unsuccessful attempt was made to arbitrate, and on the 24th of July the plaintiffs brought this action. The court held that damages were to be estimated on the basis of the market value of the maize on July 24th, and not in accordance with the market value on September 5th, when the goods were actually resold. The sellers had treated the repudiation as a wrongful ending of the contract by bringing their action, and the buyers were entitled to have their loss mitigated by any reasonable means that a prudent man ought to have adopted. Since the market value was still falling, an immediate resale should have been made, and the defendants' loss

should not be increased by the plaintiffs' neglect.

In *Zuck v. McClure* (1881), 98 Pa. St. 541, the plaintiff had made two contracts with the defendants, the first an executed contract and the second a contract for future delivery. Suit was brought on the first, for the price of coke sold and delivered, and the defendants set up a breach of the second as a counter-claim. The second contract called for the delivery by the plaintiff to the defendants of all coke burned in the plaintiff's furnaces during a certain time. The plaintiff informed the defendants that he would not fulfill his contract, but the defendants refused to consider the contract broken and notified the plaintiff that they were prepared to receive the coke under the contract. The action on the first contract, to which this alleged breach of the second is interposed as a counter-claim, was commenced on November 29th, the refusal of plaintiff to perform the second contract was given on November 19th, and the defendants' insistence upon compliance was made on December 4th. The court held that on November 29th, when this action was commenced, there was no breach of the second contract, since the defendants had not accepted the plaintiff's notice of breach, such notice being a mere matter of intention and subject to withdrawal until accepted by the other party as a present breach.

In *Marks v. Van Elghen* (1898, U. S. App.), 85 Fed. R. 853, 30 C. C. A. 208, a contract had been made

¹See *ante*, § 1090.

renounce his repudiation,¹ and have the goods upon payment of the price.² He will also be entitled to the benefit of changes in the market value at the time of ascertaining the damages.³

§ 1709. — Measure of damages if seller does treat it as a present breach.— But while the seller is thus not *obliged* to treat the repudiation as a present breach, he *may* do so, and if he does he may proceed to recover his damages as for a total breach of the entire contract. The measure of damages in such a case will be the difference between the contract price and what it would have cost him to produce and deliver the goods according to the contract,⁴ — in addition, of course, to payment

whereby the plaintiffs agreed to sell and the defendant to buy five thousand bags of sugar, at a specified price, to be shipped during the following June or July from Holland to New York or Baltimore. Before the contract had been performed or the time for performance had expired, the defendant stated to the plaintiffs that he did not intend to carry out the contract and would have nothing to do with it, whereupon he was notified by the plaintiffs that they would dispose of the sugar elsewhere and would hold him responsible for any loss. This action was soon after brought. It was held by the circuit court, and affirmed by the circuit court of appeals, that the plaintiffs were justified in treating the unequivocal refusal of defendant to perform as a present breach of the contract, if they chose so to do, and their right of action for damages would not be prejudiced thereby. In the opinion of the court this right to elect whether to treat the contract as terminated or as still existing, with a present right of action in case it is considered terminated, is sup-

ported by the “overwhelming preponderance” of authority.

¹ See *ante*, § 1090. But he may not do this where the seller, in reliance upon the repudiation, has changed his position, as by reselling the goods to another person. *Windmuller v. Pope* (1887), 107 N. Y. 674, 14 N. E. R. 436.

² *Stokes v. Mackay* (1895), 147 N. Y. 223, 41 N. E. R. 496.

³ See *Kadish v. Young*, *supra*.

⁴ *Masterton v. Mayor of Brooklyn* (1845), 7 Hill (N. Y.), 61, 42 Am. Dec. 38; *Mechem's Cases on Damages*, 141; *Tahoe Ice Co. v. Union Ice Co.* (1895), 109 Cal. 242, 41 Pac. R. 1020; *Hale v. Trout* (1868), 35 Cal. 229; *Philadelphia, etc. R. Co. v. Howard* (1851), 54 U. S. (13 How.) 307; *Burrell v. New York Salt Co.* (1865), 14 Mich. 34; *Goodrich v. Hubbard* (1883), 51 Mich. 62, 16 N. W. R. 232; *Atkinson v. Morse* (1886), 63 Mich. 276, 29 N. W. R. 711; *Leonard v. Beaudry* (1888), 68 Mich. 312, 36 N. W. R. 88; *Fell v. Newberry* (1895), 106 Mich. 542, 64 N. W. R. 474; *Barrett v. Veneer Works* (1896), 110 Mich. 6, 67 N. W. R. 976; *Industrial Works v. Mitchell* (1897), 114 Mich. 29, 72 N. W. R. 25.

for what had already been delivered at the time of the repudiation.

This loss of profits is regarded as the direct and natural result of the breach of contract, and may be recovered as general damages without resorting to special allegations.¹

§ 1710. —. As of what date, however, the damages are to be estimated, the authorities are not agreed. In *Masterton v. Mayor of Brooklyn*,² to which reference has already been made, it was held by the majority of the court that "where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present as in actions predicated upon a failure to perform at the day." Judge Beardsley, on the other hand, was of opinion that the damages should be estimated as nearly as possible as of the dates when performance would have been due.

§ 1711. —. In a leading English case³ it was said by Brett, J., that "although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. It appears to me that what is laid down by Cockburn, C. J., in *Frost v. Knight*⁴ involves the very distinction which I am endeavoring

¹Tahoe Ice Co. v. Union Ice Co. *supra* [citing Burrell v. New York Salt Co., *supra*; O'Connell v. Hotel

Mayor of Brooklyn, *supra*; Laraway v. Perkins, 10 N. Y. 371].

Co., 90 Cal. 515; Ennis v. Buckeye Pub. Co., 44 Minn. 105; Shaw v. Hoff-

²7 Hill (N. Y.), 61, 42 Am. Dec. 38; Mechem's Cases on Damages, 141.

man, 21 Mich. 151; Masterton v.

³Roper v. Johnson (1873), L. R. 8 Com. Pl. 167, 4 Moak's Eng. 397.

⁴L. R. 7 Ex. 111, 1 Moak's Eng. 218.

to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach."

§ 1712. — The same rule is declared by Mr. Mayne in his work on Damages:¹ "Even when the plaintiff has exercised his option of treating the contract as rescinded [broken?] before the time for its completion has elapsed, and has commenced his action before that time, the damages will still be calculated with reference to the date at which it should have been carried out. In other words, the contract will be treated as rescinded for the purpose of suing upon it, and as existing for the purpose of calculating the damages."

In Sedgwick on Damages² it is suggested that this rule is proper where the contract is divisible and the successive breaches have occurred before the action is brought; but where the contract is indivisible, and a present refusal is to be treated as an entire breach, then, "if the periods specified in the contract have not arrived before the trial of the cause, any effort to fix the rights of the parties at those various times must be mere matter of conjecture, and *probable expense* is neither a precise nor a safe direction for a jury."

The English rule seems to be sustained by the greater weight of reason and authority.³

§ 1713. — **Treating contract as rescinded and recovering quantum valebat.**—The seller, moreover, instead of treating the buyer's repudiation as a present *breach* of the contract merely, may regard it as a total *rescission* of the contract, and recover the reasonable value of what he has already furnished and the buyer has accepted, as though there had been no contract.⁴ Thus where there was a contract for the supplying of

¹6th Eng. ed. 179.

²8th ed., vol. II, p. 314.

³See Goodrich v. Hubbard (1883), 51

Mich. 62, 16 N. W. R. 232. *Contra*,

Fail v. McRee (1860), 36 Ala. 61.

⁴Wellston Coal Co. v. Franklin

coal throughout the year at a uniform rate per ton, though the coal in some seasons was worth more than the price fixed, and the buyer, after getting the benefit of the rate during the season when coal was high, repudiated it at the time when the price was lower, it was held that the seller might treat the repudiation as a rescission and recover the market price of the coal furnished though in excess of the contract price.¹

Paper Co. (1897), 57 Ohio St. 182, 48 338; Merrill v. Railroad Co., 16 Wend. N. E. R. 888 [citing Chamberlin v. 586; Clark v. Mayor of N. Y., 4 N. Y. Scott, 33 Vt. 80; McCullough v. Baker, 338].
47 Mo. 401; Kearney v. Doyle, 22 ¹Wellston Coal Co. v. Franklin Mich. 294; Buffkin v. Baird, 73 N. C. Paper Co., *supra*.
283; United States v. Behan, 110 U. S.

CHAPTER IV.

OF THE REMEDIES OF THE BUYER AGAINST THE SELLER.

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1741. — How, when price paid in advance.

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1750-1753. — How, when seller repudiates before time for performance.

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1756. Measure of damages where special circumstances were in contemplation.

- § 1757-1759. — General rule of damages for breach of contract — *Hadley v. Baxendale*.
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- 1763-1765. — Resale known to vendor.
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| <p>§ 1816. — Purchaser of draft with bill of lading attached.</p> <p>1817, 1818. Measure of damages for breach of warranty — In general.</p> <p>1819. — Time.</p> <p>1820. — Place.</p> <p>1821. Measure of damages for breach of warranty when goods bought for special purpose.</p> <p>1822-1825. — Damages for losses incidental to use or purpose contemplated.</p> <p>1826. — Expenses incurred.</p> <p>1827, 1828. — Gains prevented.</p> <p>1829-1831. — Purely speculative profits.</p> <p>1832. — Losses not contemplated.</p> <p>1833. Measure of damages where goods bought to be resold.</p> <p>1834. — Damages paid sub-vendee for breach of same warranty.</p> | <p>§ 1835. Buyer may recover for breach of warranty though he has not paid the price.</p> <p>1836. — Or though he has paid the price.</p> <p>1837. — Or though he may have resold the goods.</p> <p>1838. — Or though he may have made a profit on them.</p> <p>1839. Remedies for deceit or fraud.</p> <p>1840. — Elements of fraud.</p> <p>1841. — Reliance on representations.</p> <p>1842. — Representations must have been proximate cause of injury.</p> <p>1843. — Measure of damages.</p> <p>1844. Buyer may recoup damages in action by seller for the price.</p> <p>1845-1847. Defense of failure of consideration.</p> <p>1848-1850. Recovery as for failure of consideration.</p> |
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§ 1714. Purpose of this chapter.— Having now considered the remedies of which the seller may avail himself either against the goods or the buyer personally, or both, there remains only to be ascertained what are the remedies to which the buyer may have recourse against the seller. The range of these remedies will necessarily be less wide than those of the seller, because the buyer cannot often be in a situation to seek remedies against the goods, but must usually confine himself to actions against the seller personally.

§ 1715. How subjects classified.— In dealing with the matter of the buyer's remedies, a classification substantially the same as that adopted in the preceding chapter may be found convenient. Thus there may be considered the remedies of the buyer —

- I. Where the title has not passed, and
 1. The goods have not been delivered, or
 2. The goods have been delivered.

II. Where the title has passed, and

1. The chattel is not delivered, or
2. The chattel is delivered, but
 - (a) There is delay in delivery, or
 - (b) The title fails in whole or in part, or
 - (c) The chattel proves not to be of the kind or quality represented or warranted.

I.

WHERE THE TITLE HAS NOT PASSED.

§ 1716. **In general.**—The simplest form, perhaps, of the seller's breach of contract is that which is presented when, while the contract remains wholly executory, he fails or refuses to proceed with its performance. Usually and naturally the goods will not have been delivered, but will still remain in the possession of the seller. He may, however, have gone so far as to deliver the goods in anticipation of the transfer of the title, as in the common case already considered of the conditional contract to sell, under which possession is transferred but title is retained until the price is paid; or the case in which the goods at the time of the contract were already in the possession of the buyer. Each of these general types may be considered separately.

1. *Where the Goods have not been Delivered.*

§ 1717. **Seller's breach of contract to sell and convey.**—As has been stated in the preceding section, the simplest type of the seller's breach of his undertaking is the case in which he repudiates the contract while it remains wholly executory, and wrongfully fails or refuses to transfer the title and deliver possession to the buyer.

The ideal remedy for this state of things would, perhaps, seem to be some process or proceeding by which the seller could be specifically compelled to do the very thing which he agreed to do, to wit, to actually enforce specific performance

of his agreement to transfer the title and surrender the possession to the buyer.

Specific performance, however, as will be seen, is not always practicable nor usually necessary. If the buyer has paid the price in advance, there may be often strong reasons for such a remedy; but if the buyer has not paid in advance and still has the money in his pocket, he may usually go into the market and supply himself with like goods, perhaps with no loss, and usually with but little. In such a case a recovery of damages adequate to compensate for such a loss would furnish a complete and satisfactory remedy. There may, on the contrary, be cases in which like goods cannot be procured in the market, and in such event the recovery of damages does not furnish so satisfactory a remedy.

§ 1718. Specific performance not usually the remedy.—

As has been intimated above, specific performance of the contract to sell and convey a chattel will not usually be decreed.¹ As is said by Lord Justice Fry:² "The court for the most part refuses to interfere in respect of chattels, both because damages are a sufficient remedy and because the price of such articles, especially of merchandise, varies so as often to render the specific

¹ See *Moulton v. Warren Mfg. Co.* 55 N. E. R. 683; *Ames v. Witbeck* (1900), — Minn. —, 83 N. W. R. 1082; (1899), 179 Ill. 458, 53 N. E. R. 969; *Northern Trust Co. v. Markell* (1895), 61 Minn. 271, 63 N. W. R. 735; *Steinmeyer v. Siebert* (1899), 190 Pa. St. 471, 42 Atl. R. 880, 70 Am. St. R. 641; *Hissam v. Parrish* (1896), 41 W. Va. 686, 24 S. E. R. 600, 56 Am. St. R. 892; *Manton v. Ray* (1894), 18 R. I. 672, 29 Atl. R. 998, 49 Am. St. R. 811; *Eckstein v. Downing* (1886), 64 N. H. 248, 9 Atl. R. 626, 10 Am. St. R. 404; *New England Trust Co. v. Abbott* (1894), 162 Mass. 148, 38 N. E. R. 432, 27 L. R. A. 271; *Williams v. Montgomery* (1896), 148 N. Y. 519, 43 N. E. R. 57; *Todd v. Diamond State Iron Co.* (1889), 8 Houst. (Del.) 372, 14 Atl. R. 27; *Clark v. Truitt* (1899), 183 Ill. 239, 55 N. E. R. 683; *Anderson v. Olsen* (1900), 188 Ill. 502, 59 N. E. R. 239; *Carolee v. Handelis* (1897), 103 Ga. 299, 29 S. E. R. 935; *Millirons v. Dillon* (1897), 100 Ga. 656, 28 S. E. R. 385; *Krouse v. Woodward* (1895), 110 Cal. 638, 42 Pac. R. 1084; *Stuart v. Pennis* (1895), 91 Va. 688, 22 S. E. R. 509; *Electric Service Co. v. Gill-Alexander Co.* (1894), 125 Mo. 140, 28 S. W. R. 486; *Rigg v. Reading, etc. St. Ry. Co.* (1899), 191 Pa. St. 298, 43 Atl. R. 212; *Lining v. Geddes* (1826), 1 McCord (S. C.), Eq. 304, 16 Am. Dec. 606.

² Fry on Specific Performance (3d Eng. ed., 1892), § 78.

execution of contracts for their sale and delivery an act of injustice, entailing perhaps ruin on one side, when upon an action that party might not have paid perhaps above a shilling damages. As these principles, however, do not apply to all cases of chattels, exceptions arise, which we shall now consider."

§ 1719. — **Where chattel is unique.**—"When the chattel in question is unique," continues the same authority,¹ "when there is, over and above the market-value, that which has been called the *pretium affectionis*, the court, whether the plaintiff's right has arisen from contract or not, has interfered and not left him to his common-law remedy. The leading case in this branch of the law is *Pusey v. Pusey*,² in which the heir of the family of Pusey recovered possession by a bill in equity of the celebrated Pusey horn: the grounds of the decision are insufficiently reported, but the case 'turned,' to quote Lord Eldon's language in respect of it,³ 'upon the *pretium affectionis* independent of the circumstance as to tenure, which could not be estimated in damages.' This has been followed by other similar cases, one having relation to an ancient silver altarpiece, remarkable for a Greek inscription and dedication to Hercules;⁴ another to a tobacco-box of a remarkable and peculiar kind;⁵ another to masonic dresses and ornaments;⁶ and another to a very finely engraved cherry stone.⁷ These particular cases were suits grounded on tort or trust: but the same principle applies to cases of contract relating to chattels."

¹ Fry on Specific Performance, *ubi supra*, §§ 79, 80.

² 1 Vern. 273.

³ In *Nutbrown v. Thornton*, 10 Ves. 163.

⁴ *Duke of Somerset v. Cookson*, 3 P. Wms. 390.

⁵ *Fells v. Read*, 3 Ves. 70.

⁶ "*Lloyd v. Loaring*, 6 Ves. 773. See also *Saville v. Tankred*, 1 Ves. Sr. 101; s. c., 3 Sw. 141, n.; *Lady Arundell v. Phipps*, 10 Ves. 139; *Lowther v. Lord*

Lowther, 13 Ves. 95. A ship is probably within this principle. See *Lynn v. Chaters*, 2 Ke. 521, and *Claringbould v. Curtis*, 21 L. J. Ch. 541; *De Mattos v. Gibson*, 4 De G. & J. 276."

⁷ "Per Lord Hardwicke in *Pearne v. Lisle*, Ambl. 75, in which case a specific delivery of negroes was prayed, 'but that is not necessary,' said his lordship; 'others are as good.'" But in *Young v. Burton* (1841), 1 McMul. (S. C.) Eq. 255, this

§ 1720. — **Chattels of peculiar importance.**— Continuing in a later section,¹ Lord Justice Fry further says: “Hitherto unique chattels have been spoken of; but it appears that such jurisdiction as the court exercises in the case of unique chattels it may also exercise in the case of chattels which, though not unique, possess a special and peculiar value to the plaintiff. Thus in *North v. The Great Northern Ry. Co.*,² the court upheld its jurisdiction to interfere to prevent the sale of certain wagons belonging to the plaintiff, which had been used by the plaintiff in his business of a colliery owner, and which the defendants asserted that they had a right to detain and sell. ‘Where specific things,’ said Stuart, V. C.,³ ‘necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, this court has undoubted jurisdiction to interfere by injunction and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming assets.’”

§ 1721. — In accordance with this rule, it was held that, where one party had agreed to supply to the other certain goods indispensable to the business of the latter and which could not be elsewhere obtained, specific performance of the agreement would be enforced.⁴ The court approved “as a well-settled principle in the doctrine of specific performance” the rule “that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such cases the plaintiff could not be indemnified by any such amount of damages as he could recover at law.”

doctrine as to slaves was denied. See also *Bryan v. Robert* (1846), 1 Strob. (S. C.) Eq. 334; *Butler v. Hicks* (1848), 11 Sm. & M. (Miss.) 78; *Savery v. Spence* (1848), 13 Ala. 561; *Dudley v. Mallory* (1848), 4 Ga. 52.

² 2 Giff. 64.

³ p. 69.

⁴ *Equitable Gas L. Co. v. Baltimore Coal Tar & Mfg. Co.* (1884), 63 Md. 285. See also *Conemaugh Gas Co. v. Jackson Farm Gas Co.* (1898), 186 Pa.

¹ Fry on Specific Performance, *ubi supra*, § 85. St. 443, 40 Atl. R. 1000.

§ 1722. —. "So, too," says Lord Justice Fry further,¹ "there is the high authority of Lord Hardwicke for suggesting that specific performance might be maintained by a shipbuilder if he were to contract with a land-owner for the supply of timber from an adjoining estate, the ship-builder being under contract to complete a ship by a given time, for which the supply of such timber by the defendant was essential. But this seems open to doubt; and certainly the doctrine will not be extended to mere cases of convenience, as the supply of coal from an adjoining colliery when plenty of other coal can be procured in the neighborhood."²

§ 1723. —. A limitation, however, has been put upon the jurisdiction over articles unique or of special value. For, says Lord Justice Fry,³ "it also appears that if the chattel be of a peculiar value, but by contract between the parties a price has been put upon the chattel, that circumstance has been treated as precluding the jurisdiction; for it is an admission that by a money payment full relief can be had."⁴

§ 1724. — Inadequate remedy at law.— Many cases state the rule still more broadly. Thus it is said in Maryland:⁵ "We take it to be well settled that where there is an agreement to buy a specific chattel for a specific purpose, and this purpose can only be answered by the delivery of the chattel

¹ Fry on Specific Performance, *ubi supra*, § 86.

² "Per Lord Hardwicke in *Buxton v. Lister*, 3 Atk. 383, compared with *Pollard v. Clayton*, 1 K. & J. 462. And *cf.* *Fothergill v. Rowland*, L. R. 17 Eq. 132."

³ Fry on Specific Performance, *ubi supra*, § 84.

⁴ Citing *Dowling v. Betjemann*, 2 Johns. & Hem. 544.

⁵ *Gottschalk v. Stein* (1888), 69 Md. 51, 13 Atl. R. 625. See also *Clark v. Flint* (1839), 22 Pick. (Mass.) 231, 33 Am. Dec. 733; *Williams v. Mont-*

gomery (1896), 148 N. Y. 519, 43 N. E. R. 57; *Cushman v. Thayer Mfg. Co.* (1879), 76 N. Y. 365; *Johnson v. Brooks* (1883), 93 N. Y. 337; *Frue v. Houghton* (1882), 6 Colo. 318. In *Brady v. Yost* (Idaho, 1898), 55 Pac. R. 542, it is held that a contract for the sale by the defendant to the plaintiff of a newspaper business, printing plant and material used in the business, with the purpose of continuing it, will be specifically enforced in equity, on the ground that there is no adequate remedy at law.

itself; or where, from the nature of the subject-matter of the agreement, the measure of damages must necessarily be uncertain; or where damages will not be as beneficial to the purchaser as the performance of the contract, equity will interfere, and decree the specific performance of the contract, because, in such cases, an action at law for a breach of the contract will not afford the purchaser a complete and adequate remedy."

§ 1725. — Chattels connected with enjoyment of estate.—"Cases might probably arise," continues Lord Justice Fry,¹ "in which the court would interfere in respect of chattels connected with the enjoyment of an estate, where but for such connection it would not exercise jurisdiction. In one case Lord Eldon made an order specifically to restore to a tenant the stock on a farm, which had been seized by the landlord under a distress and bill of sale; his lordship holding that, under the circumstances of that case, there was an entire contract by which the landlord agreed to let the tenant have both the estate and the chattels, the enjoyment of the chattels being requisite for the enjoyment of the estate."²

§ 1726. — Contracts for sale and delivery in instalments.—"Lord Hardwicke seems to have entertained the view," remarks further the same author,³ "that where the contract was for the delivery of chattels by instalments and for payment in a like method, the court would entertain jurisdiction. In a case cited by his lordship, articles for the sale of eight hundred tons of iron, to be paid for by instalments, at periods running through some years, were specifically enforced.⁴ The case appears to have been, as already stated, approved by his lordship, but it was doubted by Lord Hatherley (when V. C.), who remarked on the absence of any case for the sale of mere goods being supported on the ground of their being to

¹ Fry on Specific Performance, *ubi supra*, § 87.

² Nutbrown v. Thornton, 10 Ves. 159.

³ Fry on Specific Performance, *ubi supra*, § 89.

⁴ Taylor v. Neville, cited 3 Atk. 384. Distinguish Nives v. Nives, 15 Ch. Div. 649.

⁵ Pollard v. Clayton, 1 K. & J. 462.

be delivered by instalments. Mr. Austin, too, has expressed his inability to understand on what principle the case proceeded,¹ and a like inability is here confessed."

§ 1727. — Contracts for sale of corporate stocks and bonds.—The same general principles apply to contracts for the sale of corporate stocks and bonds. If like securities are readily obtainable in the market so that the buyer may thus procure them;² if their value is certain and the buyer has in them no other than a mere pecuniary interest, so that an award of damages will adequately compensate him,³ the court will usually refuse to decree specific performance. But if they cannot elsewhere be obtained, and the buyer has some lawful and peculiar interest in them which cannot be adequately protected by an award of damages;⁴ or if their value is uncertain or there is other reason why the award of the law court will not

¹ Jurisprudence, 808.

² *Todd v. Diamond State Iron Co.* (1889), 8 Houst. (Del.) 372, 14 Atl. R. 27; *Cohn v. Mitchell* (1885), 115 Ill. 124, 3 N. E. R. 420; *Ryan v. McLane* (1900), 91 Md. 175, 46 Atl. R. 340, 50 L. R. A. 501 and exhaustive note.

³ Thus where there was a sale of a yacht, and the defendant [buyer] agreed to pay therefor a certain number of shares of the stock of a certain corporation, but there was no evidence tending to show that the plaintiff had any wish or reason to become the owner of the stock rather than of any other stock of equal value, or that he would not have agreed to take any other stock of equal value in payment of the yacht, or a sum of money equal to that value, specific performance was denied. *Eckstein v. Downing* (1886), 64 N. H. 248, 9 Atl. R. 626, 10 Am. St. R. 404. And, generally, where no fiduciary relations are involved and the stocks have no peculiar value, and compensation in money would be adequate. *Treasurer v.*

Commercial Coal Mining Co. (1863), 23 Cal. 390; *Avery v. Ryan* (1889), 74 Wis. 591, 43 N. W. R. 317.

⁴ Equity will decree specific performance if like stocks cannot be procured elsewhere, or if the legal remedy is doubtful or uncertain, and an award of damages will not be adequate (*Manton v. Ray* (1894), 18 R. I. 672, 29 Atl. R. 998, 49 Am. St. R. 811; s. c. again, 19 R. I. 423, 36 Atl. R. 1125; *Brady v. Yost* (1898), — Idaho, —, 55 Pac. R. 542; *Northern Central Ry. Co. v. Walworth* (1899), 193 Pa. St. 207, 44 Atl. R. 253; *New England Trust Co. v. Abbott* (1894), 162 Mass. 148, 38 N. E. R. 432, 27 L. R. A. 271; *Williams v. Montgomery* (1896), 148 N. Y. 519, 43 N. E. R. 57; *Cushman v. Thayer Mfg. Co.* (1879), 76 N. Y. 365; *Johnson v. Brooks* (1883), 93 N. Y. 337; *Frue v. Houghton* (1882), 6 Colo. 318); or where the stock has some unique and special value to the plaintiff (*Bumgardner v. Leavitt* (1891), 35 W. Va. 194).

A pledgor of shares of stock is en-

do full justice to the buyer,¹ especially if fiduciary or trust relations are involved,² then the court may decree that the contract for their sale and delivery shall be specifically performed.

§ 1728. —. Even here, however, there is room for the exercise of sound discretion and the furtherance of public policy; and if the execution of specific performance would operate harshly, unjustly or inequitably,³ or would promote objects opposed to public policy,⁴ relief will be denied.

titled to specific performance when the stock has no market or ascertainable value, and the pledgor bought it for investment with a view to its increase in value, and he cannot buy more because no holder will sell. *Krouse v. Woodward* (1895), 110 Cal. 638, 42 Pac. R. 1084.

A promise by a corporation to transfer some of its bonds may be specifically enforced where it appears that the corporation is insolvent and the bonds have no market value, such value being dependent upon questions relating to title to real estate which can be determined only by a court of equity. *Ames v. Witbeck* (1899), 179 Ill. 458, 53 N. E. R. 969.

Specific performance of a contract relating to stocks cannot be demanded as a right. But a court of equity will grant it at its discretion when it appears that damages would not be adequate owing to the fact that the matter was in the nature of an experiment, so that the result could not be known. *Williams v. Montgomery* (1896), 148 N. Y. 519, 43 N. E. R. 57 [citing *Matter of Argus Co.*, 138 N. Y. 557; *Johnson v. Brooks*, 93 N. Y. 337].

¹ Thus, in *Steinmeyer v. Siebert* (1899), 190 Pa. St. 471, 42 Atl. R. 880, 70 Am. St. R. 641, it is said: "The rule that jurisdiction in equity will

not be entertained to decree a specific performance respecting goods, chattels, stocks and other things of a merely personal nature is limited to cases where a compensation in damages will furnish a complete remedy. Where the wrong is a betrayal of confidence, equity will decree restitution, which may be enforced specifically against the wrong-doer. In *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584, a clerk was compelled to surrender drafts, maps, plans, etc., which he had withheld from his employer; in *Abbott v. Reeves*, 49 Pa. St. 494, 88 Am. Dec. 510, persons who had borrowed stocks and bonds from an executor were required to make restitution; in *Pennsylvania Co. v. Franklin Fire Ins. Co.*, 181 Pa. St. 40, the defendant was required to issue new certificates of stock to an owner whose certificates had been transferred under forged powers of attorney."

² Where trust or fiduciary relations are involved, the relief may be granted. *Goodwin's Appeal* (1888), 117 Pa. St. 514; *Cowles v. Whitman* (1834), 10 Conn. 121, 25 Am. Dec. 60; *Krohn v. Williamson* (1894), 62 Fed. R. 869.

³ *Rigg v. Railway Co.* (1899), 191 Pa. St. 298, 43 Atl. R. 212.

⁴ As where the stock is sought in

§ 1729. — Contracts for the sale of inventions, patents or patented articles.— So, on the same ground that an award of damages would usually be an inadequate remedy, performance of a contract for the sale and assignment of a patent or invention may be specifically enforced. “The principal footing of such jurisdiction,” it is said,¹ “is the obvious inadequacy of the redress which an ordinary action at law for damages would afford, as applied to such property, in event of refusal to comply with an agreement for its sale. Rights acquired under letters patent for inventions are of such peculiar nature that they are justly considered proper subject-matter for suits for specific performance.” For like reasons an agreement to supply articles which the seller alone can supply, because he controls the patent upon them, may be thus enforced.²

§ 1730. — Contracts for sale of debts, notes, etc.— So also contracts for the sale of a specific debt,³ or the sale of specific notes bought for a specific purpose known to the seller,⁴ may be enforced, as the identical thing is the thing desired and damages would not be an adequate remedy.

§ 1731. — Contracts for the sale of growing trees.— So, further, because of the inadequacy of the remedy at law, it was held in a recent case that, if a contract for the sale of growing

order to obtain control of the corporation, *e. g.*, a bank. Foll’s Appeal (1879), 91 Pa. St. 434; Gage v. Fisher (1895), 5 N. Dak. 297, 65 N. W. R. 809. Though there may be cases where such control would be entirely lawful. O’Neill v. Webb (1898), 78 Mo. App. 1. Compare Brady v. Yost (1898), — Idaho, —, 55 Pac. R. 542.

¹ Secret Service Co. v. Gill-Alexander Mfg. Co. (1894), 125 Mo. 140, 28 S. W. R. 486 [citing Corbin v. Tracy (1867), 34 Conn. 325; Binney v. Annan (1871), 107 Mass. 94, 9 Am. R. 10]. To like effect: Hapgood v. Rosenstock (1885), 23 Fed. R. 86 (C. C. N. Y.);

Somerby v. Buntin (1875), 118 Mass. 279; Blackmer v. Stone (1889), 51 Ark. 489, 11 S. W. R. 693 [citing Somerby v. Buntin, *supra*; Burr v. De La Vergne, 102 N. Y. 415; Blakeney v. Goode, 30 Ohio St. 350; Littlefield v. Perry, 21 Wall. 205]. But see Anderson v. Olsen (1900), 188 Ill. 502, 59 N. E. R. 239.

² Adams v. Messinger (1888), 147 Mass. 185, 17 N. E. R. 491. 9 Am. St. R. 679 [citing Hapgood v. Rosenstock, *supra*].

³ Wright v. Bell, 5 Price, 325.

⁴ Gottschalk v. Stein (1888), 69 Md. 51, 13 Atl. R. 625. -

trees was to be regarded as relating to a chattel, it would be specifically enforced; if it were held to relate to real estate, it would be a "matter of course" to enforce it.¹

§ 1732. — **Specific performance not to be made substitute for award of damages.**— But the remedy of specific performance is not to be made a substitute for the ordinary action for damages in cases to which that action is appropriate. Thus, in a late case, it appeared that the plaintiff, who desired to buy a standard-bred Jersey calf, had inquired of the defendant, who had such calves for sale, concerning a certain one, which was so bred but which the defendant fraudulently denied to be so. The defendant thereupon directed plaintiff's attention to another calf, which the defendant fraudulently represented to be of the quality desired but which in fact was not. Plaintiff thereupon bought the latter rather than the former. Later, on discovering the fraud, the plaintiff sought by an action for "specific performance" to compel the defendant to take back the calf which plaintiff so bought and deliver to him in its stead the one which he would have purchased but for the defendant's false representations. His right to this relief, however, was denied, "his attempt thus to obtain it" being characterized by the court as "absolutely absurd and untenable."²

§ 1733. — **Will not be granted where contract ambiguous, uncertain or unfair.**— And finally, not to go too far into the general subject of specific performance, it is to be observed that this relief is not a matter of course; it will not be granted where the contract is ambiguous, indefinite or uncertain,³ or the article unidentified and unascertained,⁴ nor where the granting of the relief prayed for would work results inequitable, unfair and unconscionable.⁵

¹ *Stuart v. Pennis* (1895), 91 Va. 688, 22 S. E. R. 509.

² *Millirons v. Dillon* (1897), 100 Ga. 656, 28 S. E. R. 385.

³ See Fry on Specific Performance, *ubi supra*, § 334; *Todd v. Diamond*

State Iron Co. (1889), 8 Houst. (Del.) 372, 14 Atl. R. 27.

⁴ *Lighthouse v. Third Nat. Bank* (1900), 162 N. Y. 336, 56 N. E. R. 738.

⁵ See Fry on Specific Performance, § 334; *Rigg v. Railway Co.* (1899), 191 Pa. St. 298, 43 Atl. R. 212.

§ 1734. **Action at law for damages the usual remedy.**— In the cases in which specific performance cannot be enforced, the remedy of the buyer for the seller's breach of his agreement to sell and convey must be sought at law. The buyer in the contingency now being considered — breach before the transfer of title — can obviously not recover the goods, for, by the hypothesis, the title has not vested in him. He must therefore have recourse to an action for damages for the breach of contract. If he has not paid the price in advance, he will still have his money and may go into the market and buy the goods. If he can buy them for not more than the contract price, he obviously has suffered no more than a nominal injury; if he is compelled to pay more than the contract price, that excess usually measures the extent of his loss. If, however, he has paid the price in advance, he is clearly entitled to a recovery of the sum so paid in addition to compensation for any other loss sustained by reason of the excess of the market over the contract price.

§ 1735. —. Where the goods have a market value, that value must ordinarily control. If, however, they have no market value, the buyer has still lost any excess which there might be between the price he was to pay and the actual value of the goods he was to receive; and their actual value may then be shown by other evidence.

The buyer was entitled to the goods at the time and place fixed by the contract; and values at that time and place must therefore govern the allowance.

From the time at which he thus became entitled to some specific sum as compensation for the breach of contract, he should have interest on that amount.

These considerations will suggest the rules which must apply to the ordinary case.

§ 1736. **Measure of damages usually difference between the contract price and value of goods at time and place of delivery, with interest.**— For the breach of the seller's agreement to sell and convey, therefore, the measure of the buyer's

damages, if he has not paid the price or any part of it in advance, will ordinarily be the difference between the contract price and the market value of the goods at the time and place of delivery,¹ with interest on that difference from the date of the default.²

Cases, of course, arise where special damages may have been in contemplation, and as to these a different rule may apply, which will be considered later; but for the ordinary case, involving no special circumstances, the rule as given above applies.

§ 1737. —. If the default be as to the delivery of part only, and the contract is severable, then damages as to that part could be recovered under the general rule already given. If the contract were entire, but the part not delivered could be procured in the market, the general rule may also be applied.³ But where the contract is entire and the missing part cannot be so procured, damages based upon the diminished value of the whole from the non-delivery of the part — that

¹ *Dana v. Fiedler* (1854), 12 N. Y. 40, 62 Am. Dec. 130; *McKnight v. Dunlop* (1851), 5 N. Y. 537, 55 Am. Dec. 370; *Cahen v. Platt* (1877), 69 N. Y. 348, 25 Am. R. 203; *Saxe v. Penokee Lumber Co.* (1899), 159 N. Y. 371, 54 N. E. R. 14; *Grand Tower Co. v. Phillips* (1874), 90 U. S. (23 Wall.) 471; *Capen v. Glass Co.* (1882), 105 Ill. 185; *McGrath v. Gegner* (1893), 77 Md. 331, 26 Atl. R. 502, 39 Am. St. R. 415; *Kribs v. Jones* (1875), 44 Md. 396; *Austrian v. Springer* (1892), 94 Mich. 343, 54 N. W. R. 50, 34 Am. St. R. 350; *McKercher v. Curtis* (1877), 35 Mich. 478; *Rahm v. Deig* (1889), 121 Ind. 283, 23 N. E. R. 141; *Olson v. Sharpless* (1893), 53 Minn. 91, 55 N. W. R. 125; *Hewson Supply Co. v. Minn. Brick Co.* (1893), 55 Minn. 530, 57 N. W. R. 129; *Hill v. Smith* (1859), 32 Vt. 433; *Cockburn v. Ashland*

Lumber Co. (1882), 54 Wis. 619, 12 N. W. R. 49.

² *Dana v. Fiedler*, *supra*; *Brackett v. Edgerton* (1869), 14 Minn. 174, 100 Am. Dec. 211.

In an action to recover unliquidated damages for the breach of an executory contract to convey property, interest is not allowable unless there is a market value of the property or means accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which the plaintiff is entitled. *Sloan v. Baird* (1900), 162 N. Y. 327, 56 N. E. R. 752. See further, as to the right to interest, *Case Plow Works v. Niles & Scott Co.* (1900), 107 Wis. 9, 82 N. W. R. 568.

³ See *Vickery v. McCormick* (1888), 117 Ind. 594; *Capen v. Glass Co.* (1883), 105 Ill. 185; *Valpy v. Oakeley* (1851), 16 Q. B. 941, 71 Eng. Com. L. 941.

is, the difference between the value of the whole and the value of the part delivered— would be recoverable.¹

§ 1738. —. It is not essential to the operation of this rule giving the difference between the contract and the market price, that the buyer shall have actually gone into the market and bought other goods to supply the place of those not delivered. "It would not advantage the defaulting party if he should do so; for, if he buys at the market value, the result to the other party is the same as if he simply proved the market value."² This loss is so clearly the ordinary and necessary result of the breach of the contract that no special allegations are needed to enable the plaintiff to recover.³

§ 1739. —. If, however, the buyer has actually purchased the goods at *less* than the market price, then the amount of his real loss, and not his estimated loss, is to be made the basis. The buyer was bound to mitigate his loss if he could, and if he has done so he can recover merely compensation for the actual loss sustained.⁴

§ 1740. —. Whether, however, the buyer would be obliged to buy of the defaulting seller if he should afterward offer to sell the goods at more than the contract price, but less than the subsequent market price, has been questioned. The supreme court in New York held that he was not obliged to do so, as it might expose him to the charge of having abandoned the first contract;⁵ but on principle it would seem that the seller should be entitled to thus diminish his loss,⁶ and that the buyer need not waive his right by accepting.⁷

¹ See Field on Damages, § 268.

² *Saxe v. Penokee Lumber Co.* (1899), 159 N. Y. 371, 54 N. E. R. 42.

³ *Smith v. Lime Co.* (1898), 57 Ohio St. 518, 49 N. E. R. 695.

⁴ *Theiss v. Weiss* (1895), 166 Pa. St. 9, 31 Atl. R. 63.

⁵ *Haveemeyer v. Cunningham* (1861), 35 Barb. 515.

⁶ See *Lawrence v. Porter* and other cases cited *post*, § 1754.

⁷ That a buyer who has a right of action for the seller's default does not waive or impair it by making a new contract with the seller for the delivery of such goods is held in *McKnight v. Dunlop* (1851), 5 N. Y. 537, 55 Am. Dec. 370.

§ 1741. — **How, when price paid in advance.**—If the contract price or any part of it has been paid in advance, reimbursement for that sum must be added to the recovery. If, therefore, the contract price has so been paid in full, the full market price would be the measure,¹ with interest, as before.

§ 1742. — **How, when there is no market at place of delivery.**—If, for any reason, there be no market at the place of delivery, then the value in the nearest and most available market, to which the buyer must resort in order to supply himself, with the cost of transportation added, together with compensation for time, trouble and expense in making the repurchase, furnishes the basis for the compensation.²

§ 1743. — **How, when goods have no market value.**—If the goods are such as have no market value at all, as may easily be the fact in the case of second-hand goods, pictures, clothing, special machinery, patented articles, and the like, then their actual value, as determined by the best evidence available, must control.³ Thus, in one case it is said that, "in

¹Hill v. Smith (1859), 32 Vt. 433; Winside State Bank v. Lound (1897), 52 Neb. 469, 72 N. W. R. 486; Smith v. Dunlap (1850), 12 Ill. 184; Deere v. Lewis (1869), 51 Ill. 254; Davis v. Fish (1848), 1 G. Greene (Iowa), 406, 48 Am. Dec. 387.

²Trigg v. Clay (1891), 88 Va. 330, 13 S. E. R. 434, 29 Am. St. R. 723, Mech-
em's Cases on Damages, 239; Wash-
ington Ice Co. v. Webster (1878), 68
Me. 449; Grand Tower Co. v. Phillips
(1874), 90 U. S. (23 Wall.) 471; Cahen
v. Platt (1877), 69 N. Y. 348, 25 Am.
R. 203; Paine v. Sherwood (1875), 21
Minn. 225; Capen v. Glass Co. (1882),
105 Ill. 185; Barker v. Mann (1869), 5
Bush (Ky.), 672, 96 Am. Dec. 373.

³McHose v. Fulmer (1873), 73 Pa.
St. 365; Paine v. Sherwood (1875), 21
Minn. 225; Culin v. Woodbury Glass
Works (1885), 108 Pa. St. 220; Davis

v. School Furniture Co. (1896), 41 W.
Va. 717, 24 S. E. R. 630.

Thus in *McHose v. Fulmer*, *supra*, where there was a breach of a contract by an iron producer to supply a manufacturer with iron, and the latter could not supply himself in the market, it was said by Sharswood, J.: "When a vendor fails to comply with his contract the general rule for the measure of damages, undoubtedly, is the difference between the contract and market price of the article at the time of the breach. This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself the rule does not apply, for the reason of it ceases. Bank

the absence of any market value, the actual value must be ascertained by an investigation into what it would cost the purchaser, acting in good faith and with due diligence and reasonable prudence, to procure, in the condition required by the

of *Montgomery v. Reese*, 2 Casey, 143. 'It is manifest,' says Mr. Chief Justice Lewis, 'that this (the ordinary measure) would not remunerate him when the article could not be obtained elsewhere.' If an article of the same quality cannot be procured in the market, its market price cannot be ascertained, and we are without the necessary data for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article or not receiving the advance on his contract price upon any contracts which he had himself made in reliance upon the fulfillment of the contract by the vendor. [*Sed quære*, see § 1762.] We do not mean to say, that if he undertakes to fill his own contracts with an inferior article, and in consequence such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarranted experiment. His legitimate loss is the difference between the contract price he was to pay to his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfillment of the contract."

In *Culin v. Glass Works*, 108 Pa. St. 220, *supra*, A agreed to furnish B a certain total quantity of bottles of a particular kind. He furnished more than half the quantity but failed to deliver the balance. It was not possible to purchase enough similar goods in the market to complete the total quantity contracted for. The purchaser was a manufacturer of cooking extracts and syrup, which he put up in bottles and sold to the trade. He testified that by reason of A's default he was unable to fill orders he had on hand at the time of the breach. In an action by A against B to recover the price of the goods actually delivered, the court instructed the jury (1) that the defendant was entitled to set off the excess paid by him over the contract price for a portion of the deficient bottles which he purchased in the market, and (2) as to so much of the deficient quantity as he was unable to purchase in the market he was entitled to set off his actual loss sustained by not having such quantity furnished to him, viz., the difference between the contract price of the bottles he was to pay his vendor, and what loss he sustained in his own manufacture by not receiving the advance on the contract price upon any contracts he had himself made in reliance upon the fulfillment of the contract by the vendor. *Held*, that the instruction was as favorable to the defendant as he could reasonably ask.

contract and delivered at the place therein named for delivery, the kind and quantity of goods contracted for.”¹ And in another case, involving the value of a family portrait, the court said that to limit the recovery by its market value “would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account the cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner.”²

§ 1744. — How, when goods have neither market nor actual value.—If the goods have neither market nor actual value, the vendee is entitled to no damages other than nominal. And this is so even though the goods could not be produced or procured without the expenditure of a substantial sum, if when produced they would really be of no actual value and could not be sold in any market.³

§ 1745. — How, when no difference between contract price and value.—If there be no difference between the contract price and the market or actual value, there would, of course, be no real loss,⁴ and, at most, nominal damages would be the extent of the recovery.⁵

§ 1746. — How, when goods are to be delivered in instalments.—Where the goods, by the terms of the contract, are to be delivered in instalments on specified days, at each of which the market price may vary, resort must be had to each final day of performance, and the total recovery will be the sum of the differences upon those respective days.⁶

¹ Paine v. Sherwood, *supra*.

² Green v. Boston & L. R. Co. (1880), 128 Mass. 221, 35 Am. R. 370. As to clothing partly worn, *Fairfax v. New York Central R. Co.* (1878), 73 N. Y. 167, 29 Am. R. 119. Household furniture, etc., *International, etc. R. Co. v. Nicholson* (1884), 61 Tex. 550.

³ Barnes v. Brown (1892), 130 N. Y. 372, 29 N. E. R. 760; *Mechem's Cases on Damages*, 255.

⁴ *Merriman v. McCormick Mach. Co.* (1897), 96 Wis. 600, 71 N. W. R. 1050.

⁵ Long v. Conklin (1874), 75 Ill. 32.

⁶ Brown v. Muller (1872), L. R. 7 Ex.

The same rule has been applied where the contract was to deliver, not on specific days, but as the buyer should need and call for the goods during the season.¹

§ 1747. — **How, when goods to be delivered “on or before” a certain day.**—Where, by the terms of the contract, the goods are to be delivered “on or before” a date named, the contract is broken on that day and not before, and the market value on that day, therefore, furnishes the basis for estimating the damages.²

§ 1748. — **How, when no time fixed for the delivery.**—Where no time is fixed for the delivery of the goods, the law will presume that they are to be delivered within a reasonable

319, 3 Moak's Eng. 429; *Roper v. Johnson* (1873), L. R. 8 Com. Pl. 167, 4 Moak's Eng. 397.

¹ *Long v. Conklin* (1874), 75 Ill. 32.

In *Willock v. Crescent Oil Co.* (1898), 184 Pa. St. 245, 39 Atl. R. 77, defendant agreed to furnish plaintiff an oil refiner, with all the crude oil that the latter might “need or use” at his refinery during one year, between specified dates. The plaintiff was permitted to order the oil in lots not exceeding twenty thousand barrels at one time, but such orders were in no case to be made oftener than once in thirty days. It was also agreed that the contract might be extended for an additional year upon the same terms, if plaintiff gave due notice before the first year had fully expired. The oil was to be paid for at the current price. Two weeks before the year closed, and at a time when plaintiff had on hand more oil than he had used during the whole year, he ordered twenty thousand barrels more, which was refused by the defendant on the ground that it could not be “needed or used” during the year. Five days be-

fore the close of the year plaintiff elected to continue the contract, and a few days later gave another order for twenty thousand barrels, which was also refused. The evidence showed that the stock on hand was insufficient to supply the needs of the refinery during the second year, and plaintiff was compelled, from time to time, to buy eighty-six hundred barrels, in addition, from the defendant at a somewhat advanced price. *Held*, (1) that defendant had a right to refuse to fill the first order for the reason given by him; (2) that, as plaintiff had a right to secure his entire stock for the second year as soon as could be done under the contract, defendant had no right to refuse to fill the second order, in so far as such order was necessary to complete plaintiff's stock for the second year; (3) that plaintiff was entitled to recover the difference between the price of the eighty-six hundred barrels at the time when the second order was given and the price he was subsequently compelled to pay defendant.

² *Smith v. Berry* (1841), 18 Me. 122.

time, and their market value at the expiration of such a period,¹ and, at all events, upon a distinct refusal,² will furnish the foundation for the computation.

§ 1749. — How, when delivery postponed at request of seller.—Where the time for delivery is postponed at the request of the seller, and he then refuses to make delivery, the measure of damages, within rules already considered,³ might doubtless be estimated in view of the market at the time of the last default.⁴

§ 1750. — How, when seller repudiates before time for performance.—Discussion has already been had in several places of the question of the “anticipatory breach” of the contract by one party or the other.⁵ As has been thus seen, the buyer is not obliged to acquiesce in such a breach of the contract by the seller, and may insist upon keeping the contract operative until the time for performance arrives, and then have his damages ascertained as of that date in accordance with the general rule already given.⁶ As has also been seen, however, the buyer may acquiesce in the seller’s repudiation so far as to treat it as a present breach, and bring his action at once without waiting for the arrival of the stipulated time.⁷ If he does so, what is to be the measure of his damages?

§ 1751. — A brief consideration of some cases which would present the question may be of aid. If the contract is for the sale of a crop of potatoes to be delivered at maturity, and the seller immediately after planting repudiates the contract, the buyer’s damages, if he sues at once, can scarcely be estimated by the present difference between the contract price

¹ *Kribs v. Jones* (1875), 44 Md. 396; 157, 61 N. W. R. 364; *Hickman v. Greaves v. Ashlin* (1813), 3 Camp. 426; *Haynes* (1875), L. R. 10 Com. Pl. 598; *Tempest v. Kilner* (1846), 3 Com. B. 249, 54 Eng. Com. L. 248. *Ogle v. Lord Vane* (1868), L. R. 2 Q. B. 275, 3 id. 272.

² *Williams v. Woods* (1860), 16 Md. 220.

³ See *ante*, § 1691.

⁴ *Brown v. Sharkey* (1894), 93 Iowa,

⁵ See *ante*, §§ 1091, 1699.

⁶ See *ante*, §§ 1088, 1707.

⁷ See *ante*, §§ 1089, 1706.

and the market value of the goods. If the contract is for the sale and delivery when three years old of a colt now running with its dam, an action for a present breach will be ineffectual if the damages are to be assessed upon the basis of the present value of the colt. If, however, the contract is for the future sale of wheat, and the seller, anticipating a steadily rising market, makes an early repudiation of the contract at a time when the buyer may, at slight advance, supply himself in the market, in an action for the breach, are the damages to be estimated according to the market price when the contract was repudiated or the market price at the time fixed for delivery?

§ 1752. —. It is a general principle that a party claiming damages must do what reasonably he may to make those damages as small as possible. Applying this principle to the cases stated, it has been said to be the rule that “even if the seller repudiates the contract before the date of delivery, so that the buyer may sue at once, the damages are to be assessed as of the agreed date of delivery, unless it appears that the buyer could have supplied himself in the market on such terms as to mitigate his loss.”¹

§ 1753. —. This is in accordance with the often-cited rule laid down by Cockburn, C. J.,² that, on repudiation by the promisor, the promisee may at once bring his action as on a breach of the contract, “and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.” And in the latest case upon the question, the supreme court of the United States has declared that “as to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued

¹ Hale on Damages, p. 243.

² In *Frost v. Knight*, L. R. 7 Ex., at p. 113.

breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.”¹

§ 1754. — **How, when seller refuses to give term of credit as agreed.**—Where the seller does not refuse to deliver the goods at all, but refuses to deliver them upon the term of credit agreed upon and insists upon payment in cash, the same general principles still apply.

If the market price for cash and the contract price on credit were the same, the buyer has still sustained a loss. “Credit extended without interest is, in effect, a sale at the stipulated price less the interest for the period of credit. The damages for a breach of contract to pay money at a particular date is the lawful rate of interest for the period of default, unless some other penalty is imposed by the agreement. So it would seem that if the buyer, in order to supply himself with the articles which the seller was obligated to sell, is compelled to buy from another, and to pay cash, one element of recovery for the breach would be interest upon his purchase for the period of credit.”²

§ 1755. —. The buyer, however, would not be justified in paying more to a third person than he can obtain the goods for from the original seller by paying cash. Notwithstanding the seller’s default, it is held that the general duty of the buyer to mitigate his loss still applies, and if he can buy the goods of the original seller for cash for less than he can buy them in the market, he is bound to do so. “The obligation on the buyer to mitigate his loss, by reason of the seller’s refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer’s damage.”³

¹ Roehm v. Horst (1899), 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. R. 780, stated in full *ante*, § 1089. To like effect: Austrian v. Springer (1892), 94 Mich. 343, 54 N. W. R. 50, 34 Am. St. R. 350; Roper v. Johnson (1873), L. R. 8 Com. Pl. 167.

² Lawrence v. Porter (1894), 22 U. S. App. 483, 11 C. C. A. 27, 63 Fed. R. 62, 26 L. R. A. 167, Mechem’s Cases on Damages, 246.

³ Lawrence v. Porter, *supra*. To same effect: Warren v. Stoddart (1881), 105 U. S. 224, 26 L. ed. 1117.

§ 1756. Measure of damages where special circumstances were in contemplation.—Thus far attention has been given to the ordinary consequences which result from the seller's breach of his agreement to sell and convey. Those consequences usually are that the buyer loses the excess in value which the goods might have over and above the sum which he was to pay to get them, and compensation for that loss ordinarily does full justice to the buyer.

But there may be cases in which the buyer had in view such a special or unusual use or purpose that this mere difference in value will not adequately measure it. If he had, two conditions will suggest themselves: Did he keep that peculiar use or purpose to himself, so that the seller had no intimation that any other than the ordinary consequences would ensue? Or did he, or did the circumstances, so fully disclose this special or unusual purpose that the seller may fairly be said to have had in his contemplation when he made the contract the losses which

In this last case Stoddart had agreed to supply Warren, a canvasser, with sets of a reprint of the Encyclopedia Britannica on thirty days credit. He afterwards refused to supply them except for cash on delivery. Thereupon Warren imported the Scotch edition at a vastly greater cost, and supplied them to his customers, and sought to recover the excess as damages. But the court held that interest for thirty days was the measure of his damages.

See also *Deere v. Lewis* (1869), 51 Ill. 254; *Barker v. Mann* (1869), 5 Bush (Ky.), 672, 96 Am. Dec. 373; *Hassard v. Hardison* (1895), 117 N. C. 60, 23 S. E. R. 96.

Ability to pay cash.—There is, however, in *Cook Mfg. Co. v. Randall* (1883), 63 Iowa, 245, 17 N. W. R. 507, the statement that to require the parties "to pay cash when they had contracted for credit is not within the bounds of reason. The condition as

to credit was an important and essential provision of the contract. The law will not presume that defendants could have paid cash for the goods, and it surely did not require them to do what they are not shown to have been able to do." This case, however, is questioned in *Lawrence v. Porter*, *supra*. Compare *Havemeyer v. Cunningham* (1861), 35 Barb. (N. Y.) 515, distinguished in *Lawrence v. Porter*.

The law presumes money to be always procurable in the market at lawful [current] rates of interest (*Lowe v. Turpie* (1896), 147 Ind. 652, 44 N. E. R. 25, 37 L. R. A. 233, *Mechem's Cases on Damages*, 213); though the rule may be different where the party has been induced to rely on the promise of credit until too late to get money elsewhere. See *Lowe v. Turpie*, *supra*; *Blood v. Wilkins* (1876), 43 Iowa, 565; 1 *Sutherland on Damages*, p. 164.

might accrue as a probable result of his breach of his agreement?

§ 1757. — General rule of damages for breach of contract — *Hadley v. Baxendale*. — The general rule governing the allowance of damages for breach of contract generally has in view the two conditions referred to in the preceding section. As stated in substance in the famous English case of *Hadley v. Baxendale*,¹ and in the American case of *Griffin v. Colver*,² that

¹(1854) 9 Exch. 341, Mechem's Cases on Damages (2d ed.), 116.

²(1858) 16 N. Y. 489, 69 Am. Dec. 718, Mechem's Cases on Damages (2d ed.), 126.

The precise statement of the rule in *Hadley v. Baxendale* is this: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Continuing further, the reasons are given thus; "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus actually known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily flow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if

these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

The precise statement in *Griffin v. Colver*, decided four years later, and, so far as any internal evidence goes, without knowledge of *Hadley v. Baxendale*, is this: "The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

rule is this: The party who has broken his contract is liable to make compensation to the other for all such losses resulting from that breach as are either —

- (1) The ordinary, the usual, the commonly-to-be-expected consequences of such a breach of such a contract; or
- (2) The peculiar or unusual consequences of the breach of the particular contract in question, if, under the circumstances, it can fairly be said that both parties had those consequences in their contemplation, at the time the contract was made, as a probable result of its breach; and if those unusual consequences are neither uncertain in their nature nor remote as to their cause.

§ 1758. —. So far as liability for losses under the first branch of the rule is concerned, there can, ordinarily, be but little difficulty. The law conclusively presumes that parties contemplate the usual and ordinary consequences of their acts, and it would not be necessary for the plaintiff to allege or prove that the defendant, in the particular case, did contemplate them; nor could the defendant escape responsibility by showing that they were not called to his attention and were, in fact, not within his contemplation.

§ 1759. —. So far as liability under the second branch of the rule is concerned, it would be essential for the plaintiff to show, not perhaps that the defendant did actually contemplate the special consequences which might ensue from his breach of the contract,— for actual mental conditions are not easily inquired into,— but that, under the circumstances, there was such notice or disclosure or other evidence of those consequences that it can fairly and reasonably be said that they must have entered into the contemplation of both parties, at the time the contract was made, as a probable consequence of its breach, and that therefore the defendant assumed them when he made his promise.

§ 1760. **How these rules apply to sales.**—Applying these principles to the subject now being considered, the first branch

of the rule would reach those cases, already dealt with, in which the loss of differences in value is the usual and ordinary result.¹

The second branch will extend to all those cases in which both² parties, at the time they made the contract,³ can fairly be said to have had within their contemplation some special loss or injury which would probably result to the buyer from the failure to obtain the goods, and in which that loss so contemplated has, in fact, naturally and proximately resulted from such failure.

§ 1761. Loss of profits on resale contracted for.—The case of the vendee who is seeking to recover damages for the loss of profits which he might have made upon a resale of the goods furnishes a typical instance of the application of the rule.

If the purchaser intended to resell the goods in the market, but had not in fact contracted for their resale; or if he had contracted to resell them, but at the market price, then the usual rule of the difference between the contract and the market price furnishes an adequate remedy. But, supposing that the vendee bought the goods for resale in a particular market, or had actually made a contract for their resale at more than the market price, and loses the benefit or profit he might so have made, how then are his damages to be estimated?

§ 1762. — Resale not contemplated.—Applying here the rules above laid down, the result will be that if the seller had,

¹ See *ante*, §§ 1736 *et seq.*

² It is, of course, essential that both parties shall have contemplated the possible injury. The buyer's knowledge is not alone enough; it must appear that the seller also can fairly and reasonably be said to have the possible injury within his contemplation. *Horne v. Midland Ry. Co.* (1871), L. R. 7 C. P. 583, *Mechem's Cases on Damages* (2d ed.), 124; *Mather v. American Express Co.* (1884), 138 Mass. 55, 52 Am. R. 258, *Mechem's Cases on Damages*, 135; *Hadley v. Baxen-*

dale, supra; *Griffin v. Colver, supra*, and many other cases.

³ The notice or knowledge which is to affect the seller must also, of course, have been had when the contract was made, and no subsequent disclosure of possible or probable but unusual results can affect his liability. *Jordan v. Patterson* (1896), 67 Conn. 473, 35 Atl. R. 521, *Mechem's Cases on Damages*, 242; *Coffin v. State* (1895), 144 Ind. 578, 43 N. E. R. 654; *Penn v. Smith* (1894), 104 Ala. 445, 18 S. R. 38.

at the time he made the contract to sell, no knowledge or notice that the goods were being purchased for resale in a particular market or to be supplied under an existing contract for their resale at a particular price, no damages based upon the loss of that particular market or of the profit under that particular contract can be recovered.¹ The buyer must here content himself with the damages which may be estimated upon the basis of the general market or the actual value. A resale at a particular profit is not so far the usual and the natural result, even when goods are known to be purchased for resale, as to bring it within the first branch of the rule of *Hadley v. Baxendale*.²

§ 1763. — **Resale known to vendor.**— If, however, at the time the contract is made, the seller has such notice or knowledge that the goods are being purchased for resale in a particular market, or to be supplied in pursuance of a particular contract, that he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, then, if he breaks his contract, damages for losses caused thereby, if not uncertain or remote, may be recovered.³

¹ *Williams v. Reynolds* (1865), 6 Best & Smith, 495; *Coffin v. State* (1895), 144 Ind. 578, 43 N. E. R. 654; *Jordan v. Patterson* (1896), 67 Conn. 473, 35 Atl. R. 521, *Mechem's Cas. on Damages* (2d ed.), 242; *Devlin v. Mayor of New York* (1875), 63 N. Y. 8; *Moffitt-West Drug Co. v. Byrd* (1899), — U. S. App. —, 34 C. C. A. 351, 92 Fed. R. 290; *Orr v. Farmers' Alliance Co.* (1895), 97 Ga. 241, 22 S. E. R. 937; *Cockburn v. Ashland Lumber Co.* (1882), 54 Wis. 619, 12 N. W. R. 49; *Fox v. Harding* (1851), 7 Cush. (Mass.) 516; *Rahm v. Deig* (1889), 121 Ind. 283, 23 N. E. R. 141; *Barker v. Mann* (1869), 5 Bush (Ky.), 672, 96 Am. Dec. 373. Certainly this must be true where the contract for resale is not

made until a later time. *Coffin v. State*, *supra*.

² *Williams v. Reynolds*, *supra*; *Thol v. Henderson* (1881), 8 Q. B. Div. 457.

³ *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. Div. 670; *Grébert-Borgnis v. Nugent* (1885), 15 Q. B. Div. 85; *Robinson v. Hyer* (1895), 35 Fla. 544, 17 S. R. 745; *Penn v. Smith* (1894), 104 Ala. 445, 18 S. R. 38 [citing *Bell v. Reynolds*, 78 Ala. 511, 56 Am. R. 52; *Young v. Cureton*, 87 Ala. 727]; *Messmore v. New York Shot Co.* (1869), 40 N. Y. 422; *Wakeman v. Wheeler & Wilson Mfg. Co.* (1886), 101 N. Y. 205, 54 Am. R. 676; *Jordan v. Patterson* (1896), 67 Conn. 473, 35 Atl. R. 521, *Mechem's Cases on Damages* (2d ed.), 242; *Campbells-*

§ 1764. — As stated in a leading case,¹ the ordinary rule “is changed when the vendor knows that the purchaser has an existing contract for a resale at an advance price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the article to enable him to fulfill the same; because those profits which would accrue to the purchaser upon fulfilling the contract of resale may justly be said to have entered into the contemplation of the parties in making the contract. This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that, where a party sustains a loss by reason of a breach of a contract, he shall, so far as money can do it, be placed in the same situation with respect to damages as if the contract had been performed.”

§ 1765. — It is sometimes objected that a loss of profits is not a proper subject of compensation, and this is often true. It is not, however, because profits in themselves may not, if lost, be properly made the basis of a recovery, but because in most cases in which such a claim is made the profits in question were too speculative, uncertain or remote to be considered. Where, on the other hand, the loss of profits can be shown with reasonable certainty, it has been settled, since the case of *Masterton v. Mayor of Brooklyn*,² that a recovery may be had for the amounts so lost.

§ 1766. — **Extent of knowledge required — Particular price.**— If, when the contract of sale is made, the seller knows not only of the fact of the resale, but also of the particular price to be received upon it, there can usually be but little difficulty in holding him responsible upon the basis of that

ville Lumber Co. v. Bradlee (1895), 96 Ky. 494, 29 S. W. R. 313; Carpenter v. First Nat. Bank (1887), 119 Ill. 352; Barker v. Mann (1869), 5 Bush (Ky.), 672, 96 Am. Dec. 373.

¹ Messmore v. N. Y. Shot Co., *supra*.

² (1845) 7 Hill (N. Y.), 61, 42 Am.

Dec. 38, Mechem's Cases on Damages (2d ed.), 141. See also the full discussion in *Wakeman v. Wheeler & Wilson Mfg. Co.* (1886), 101 N. Y. 205, 54 Am. R. 676; *Bluegrass Cordage Co. v. Luthy* (1896), 98 Ky. 583, 33 S. W. R. 835.

particular price. If, however, though he knows of the fact of the resale, he does not know the price, he could not be held liable upon the basis of the particular price if it were unusual or extravagant. He must, nevertheless, be held to contemplate that the resale is to be at a fair and reasonable profit at least, and, if he knows that the article is not one which has a market price, he may be held liable upon the basis of the contract price, if that is not such as to yield an unreasonable or unfair profit.¹

¹See *Trigg v. Clay* (1891), 88 Va. 330, 13 S. E. R. 434, 29 Am. St. R. 723, *Mechem's Cases on Damages*, 239. Compare *Booth v. Rolling Mill Co.* (1875), 60 N. Y. 487, *Mechem's Cases*, 132. In *Elbinger Actien-Gesellschaft v. Armstrong* (1874), L. R. 9 Q. B. 473, the defendant, in January, 1872, agreed to furnish plaintiff with six hundred and sixty-six sets of wheels and axles according to tracings, one hundred of which were to be delivered at stated intervals in the months of February, March and April free on board at Hull; guarantee three years and three months from time of shipments. The plaintiffs were under a contract with a Russian railway company to deliver them one thousand wagons, five hundred on the 1st of May, 1872, and five hundred on the 31st of May, 1873; and they were bound to pay two roubles per wagon for each day's delay in delivery. In the course of the negotiations between plaintiffs and defendant, defendant was informed of this contract, but neither the precise day for the delivery nor the amount of the penalties was mentioned. Delay occurred in the delivery of the one hundred sets of wheels; and the plaintiffs in consequence had to pay certain penalties, but the Russian company consented to take one

rouble a day, amounting in the whole to 100*l.* The plaintiffs, having brought an action against the defendant for the delay, sought to recover as damages the 100*l.* *Held*, that the plaintiffs were not entitled to damages, as matter of right, to the amount of penalties; but that the jury might reasonably have assessed the damages at that amount.

In *Grébert-Borgnis v. Nugent* (1885), 15 Q. B. Div. 85, the defendants contracted with the plaintiff to deliver goods to him of a particular shape and description at certain prices and by instalments at different times. When the contract was made the defendants knew that, except as to price, it corresponded with and was substantially the same as a contract which the plaintiff had entered into with a French customer of his, and that it was made in order to enable the plaintiff to fulfill such last-mentioned contract. The defendants broke their contract, and, there being no market for the goods of the description contracted for, the plaintiff's customer recovered damages against him in the French court to the amount of 28*l.* *Held*, in an action against the defendants for their breach of contract, that the plaintiff was not only entitled to recover as damages the amount of

§ 1767. — Ordinarily, it is said, the price to be received upon the resale “would, presumptively, be held to be a reasonable price; but if the facts in any given case are such as to show such price to yield an extravagant or extraordinary profit,” the seller will not be bound in absence of knowledge of it; “and, in order to assess the damages, the court must be put in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction.”¹

§ 1768. — **Cost of procuring substitute.**—It not infrequently happens that the buyer, who has made a subcontract, will endeavor, in order to diminish his own liability to his subvendee, to obtain and supply something in lieu of that which his vendor has failed to furnish as agreed. Such an endeavor is to be commended, and if the buyer, acting in good faith and

profit he would have made had he been able to fulfill his contract with his customer, but also damages in respect of his liability to such customer, and that in estimating such last-mentioned damages the 28% which the French court had given might be treated as not an unreasonable one at which such damages might be assessed. The case of *Elbinger Actien-Gesellschaft v. Armstrong* (L. R. 9 Q. B. 473) was approved.

In *Booth v. Spuyten Duyvil Rolling Mill Co.* (1875), 60 N. Y. 487, *Mechem's Cases on Damages* (2d ed.), 132, plaintiff having contracted to sell and deliver to the N. Y. C. & H. R. Co. four hundred tons of rails, made of iron with steel caps, contracted with defendant to furnish the caps, the latter being informed for what purposes they were wanted. In consequence of defendant's failure to perform, plaintiff was unable to perform his contract. In an action for the breach, *held*, that in the absence

of proof that the price plaintiff was to receive was extravagant or of an unusual or exceptional character, he was entitled to recover as damages the profits he would have realized; and that the fact that the price was not communicated to defendant (it appearing that the rails were a new article, not having a market value) did not change the rule of damages.

In *Guetzkow v. Andrews* (1896), 92 Wis. 214, 66 N. W. R. 119, it is held that where a vendor is informed that his vendee is buying for resale under an existing contract, and delivers goods not as agreed, which have no market value, and which the vendee delivers to his vendee without being able to obtain the stipulated price therefor, the vendor is bound by the price his vendee was to receive, whether he knew it or not, unless it is so great as to yield an extraordinary profit.

¹ *Guetzkow v. Andrews, supra.*

with reasonable prudence, should be compelled to pay a higher price for the substitute procured, he may recover as damages the difference between what he was to pay for the original article and what he is thus compelled to pay for the substitute.¹

§ 1769. — Costs of defending action brought by sub-vendee.— So where the sub-vendee brought action against the original buyer to recover damages for failure of the latter to supply the goods, which failure was caused by the failure of the original seller to supply them as agreed, and the original buyer gave notice of the action to his vendor and requested him to defend it, which he declined to do, it was held that the original seller was also liable for the costs reasonably incurred in defending the action.²

§ 1770. — Summary of English cases.— In recapitulating a review of the English cases upon this question of damages for the loss of a resale, the English editors of Mr. Benjamin's book have given the following summary:

“If, at the time of making the contract, the seller knows that the buyer buys the goods with the intention and for the purpose of reselling them,³ although he may or may not know

¹ Thus in *Hinde v. Liddell* (1875), L. R. 10 Q. B. 265, there had been a contract by defendant to supply plaintiff with a quantity of cloth for which the plaintiff had a subcontract to resell. Defendant failed to supply the cloth and plaintiff procured the nearest substitute he could find in the market. For this he paid a higher price, but supplied it to his vendee at the contract price. It was held that he could recover the difference between what he was to pay the defendant and what he was thus compelled to pay. To like effect is *Forsyth v. Mann* (1896), 68 Vt. 116, 34 Atl. R. 481, 32 L. R. A. 788. Here a contractor failed to perform a contract to furnish a monument by a

certain time; the vendee bought granite and had the monument cut, and recovered as damages from the contractor the difference between the contract price and the actual cost, notwithstanding the cutting was done in the winter, when it cost more.

² *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413, following *Hammond v. Bussey* (1887), 20 Q. B. Div. 79, and questioning *Baxendale v. London, etc. Ry. Co.* (1874), L. R. 10 Ex. 35. See also *post*, § 1798.

³ Citing *Hammond v. Bussey*, 20 Q. B. D. 79. And knowledge gained by parol is sufficient, where the written contract of sale is silent as to the subcontract. *Sawdon v. Andrew*, 30 L. T. (N. S.) 23.

of any particular subcontract existing or contemplated,¹ the inference is that the seller contracts to be liable for the increased damages which will flow from a breach of the contract under the special circumstances, and, applying the second part of the rule laid down in *Haulley v. Baxendale*, those damages may reasonably be supposed to be within the contemplation of the parties. On the seller's breach of contract to deliver, the buyer may adopt one of two courses: (1) He may elect to fulfill his subcontract, and for that purpose go into the market and purchase the best substitute obtainable, charging the seller with the difference between the contract price of the goods and the price of the goods substituted.² (2) He may elect to abandon his subcontract, and is entitled to recover as damages from the seller his loss of profit on the sale, and further to be indemnified by him in respect of any damage (including costs reasonably incurred) or penalties which he has been compelled to pay for breach of his subcontract;³ but unless the amount of the particular damages or penalties has been made known to the seller, the buyer is not entitled to recover their amount as a matter of right, though, if reasonable, the jury may assess the indemnity at that amount.⁴

"It is further submitted that, in order to entitle the buyer to claim exceptional profits arising from a subsale, express notice of the amount of such profits must have been given to the seller at the time when the contract was made, under circumstances implying that he accepted the contract with the special condition attached to it."⁵

¹ Citing *Hamilton v. Magill*, 12 L. R. Ir. 186.

² Citing *Hinde v. Liddell*, L. R. 10 Q. B. 265.

³ Citing *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, C. A.; *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; *Elbinger Co. v. Armstrong*, L. R. 9 Q. B. 473; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, C. A.

⁴ Citing *Elbinger Co. v. Armstrong*,

L. R. 9 Q. B. 473; *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, C. A.

⁵ "See opinion of Willes, J., in *British Columbia Saw Mills Co. v. Nettleship*, L. R. 3 C. P. 499, and in *Horne v. Midland Ry. Co.*, 7 id. 583, and see *Sedgwick on Damages*, vol. I, p. 223, ed. 1880, and the case of *Booth v. Spuyten Duyvil Rolling Mills Co.*, 60 N. Y. 487, in the Court of Appeals of the State of New York."

"II. If at the time of the sale neither the subcontract nor the intention to resell is made known to the seller, notice of the subcontract given to him subsequently will not render him liable for the buyer's loss of profits on such subcontract; the buyer may either procure the best substitute for the goods as before and fulfill his subcontract, charging the seller with the difference in price, or abandon the subcontract and bring his action for damages, when the ordinary rule will apply, and the jury must estimate, as well as they can, the difference between the contract price and the market value of the goods, although there is no market price in the sense that there is no place where the buyer can readily procure the goods contracted for.¹ But the subcontract, although not brought to the knowledge of the seller, may be put in evidence to show the real value of the goods."²

"III. In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss."³

§ 1771. Damages where goods intended for a particular use.—The same general principles apply where the goods were purchased to be applied to a particular use. If that use were not known to the seller, a recovery of damages must be based upon the value of the goods for the usual and ordinary use, *i. e.*, the market or actual value. But if, though the buyer contemplated a particular use which he did not disclose, the seller contemplated another and more obvious use, damages based upon the value for the latter use may be recovered, and the seller cannot escape altogether because he and the buyer did not contemplate the same use.⁴

¹ Citing *Williams v. Reynolds*, 6 B. & S. 495; *Tbol v. Henderson*, 8 Q. B. D. 457. *Lever*, 9 Ch. D. 20, 41 L. J. (N. S.) 633, C. A.; 43 L. T. (N. S.) 706, in the House of Lords; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Warren v. Stoddart*, 105 U. S. 224.

² "Per Brett, M. R., in *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 89; *Stroud v. Austin*, 1 Cab. & E. 119."

⁴ *Cory v. Thames, etc. Co.* (1868),

³ Citing *Dunkirk Colliery Co. v. L. R. 3 Q. B. 181.*

§ 1772. —. Where, however, the seller knew of the use to which the goods were to be applied, then damages may be recovered for losses sustained for a failure to supply the goods to be so applied, subject only to the condition that the losses complained of are such as result naturally from the breach and are not remote or speculative.

§ 1773. —. Thus, where the contemplated use was known to the seller at the time he made the contract, it was held that for a failure to furnish a threshing machine as agreed, the buyer, who had not been able to procure another elsewhere, might recover for expense in caring for his grain and for losses caused by its exposure to the weather while he was waiting for the machine upon the seller's promise to supply it forthwith.¹ So, one who had agreed to supply a dealer with the ice he needed for his ice chest in which he kept fresh meat for sale was held liable for a loss of the meat caused by his failure to supply the ice, which the buyer could not procure elsewhere.² And where there was a contract to supply water for use in a boiler to make steam for heating a greenhouse, the seller who had failed to supply the water was held liable for a loss to plants therein caused by freezing.³

§ 1774. —. So, one who has failed to supply a hotel with the necessary furniture as agreed, is liable for the loss caused by inability to rent the rooms until the furniture could be obtained.⁴ And one who had agreed to supply machines which could not be procured in the market was held liable for losses caused by the consequent impossibility of launching the business in which the machines were to be used.⁵ And so it has been

¹ *Smeed v. Foord* (1859), 1 El. & El. 602, 102 Eng. Com. L. 600. But he was held not entitled to damages for a fall in the market price of wheat in the meantime.

² *Hammer v. Schoenfelder* (1879), 47 Wis. 455, 2 N. W. R. 1129.

³ *Watson v. Needham* (1894), 161

Mass. 404, 37 N. E. R. 204, following *Stock v. Boston* (1889), 149 Mass. 410, 21 N. E. R. 871, 14 Am. St. R. 430.

⁴ *Berkey & Gay Furniture Co. v. Hascall* (1890), 123 Ind. 503, 24 N. E. R. 336, 8 L. R. A. 65, *Mechem's Cases on Damages* (2d ed.), 252.

⁵ *Abbott v. Hapgood* (1889), 150

held that one who, with knowledge of the contemplated use, has agreed to supply fertilizer for a crop of cotton,¹ or poison to kill the worms which infest it,² is liable, upon default, for a consequent failure or destruction of the crop.

§ 1775. —. So where the contract was to supply goods known to be intended for use in the performance of a contract between the vendee and the State for the erection of a public building, the enhanced cost of getting other material and the direct losses caused by the necessary suspension of work in the interval may be made the basis of recovery.³

§ 1776. —. So where a sewing machine manufacturing company had encouraged parties to establish agencies for the

Mass. 248, 22 N. E. R. 907, 15 Am. St. R. 193, Mechem's Cases on Damages (2d ed.), 136.

¹ Bell v. Reynolds (1885), 78 Ala. 511, 56 Am. R. 52.

² Jones v. George (1884), 61 Tex. 345, 48 Am. R. 280. In an action for breach of contract to deliver tobacco-flues for curing plaintiff's crop, *held*, that the seller must be presumed to know the proper season for curing tobacco, and the loss that will result from lack of flues, and he is liable for the whole loss sustained by plaintiff owing to his non-delivery. Neal v. Hardware Co. (1898), 123 N. C. 104, 29 S. E. R. 96.

Where plaintiff was compelled to sell cattle at a sacrifice by reason of defendant's breach of a contract to furnish distillery slop to fatten them, he may recover the reasonable profits he would have made if the contract had been carried out. New Market Co. v. Embry (1899), — Ky. —, 48 S. W. R. 980.

A purchaser of goods may recover from the seller who fails to deliver according to contract for loss of time of his salesman who was to go

on the road with the goods, where the seller knew when the salesman was to go on the road, though he did not know that the salesman would be idle if the goods were not delivered. Blumenthal v. Stahle (1896), 98 Iowa, 722, 68 N. W. R. 447.

Where a seller of drugs fails to deliver, and the buyer loses time in waiting for and preparing for the goods, and is at the expense of hiring a doctor in preparation therefor, these losses are not too remote to be recovered in damages. Moffett-West Drug Co. v. Byrd (1898), — Ind. Ter. —, 43 S. W. R. 864.

Where both parties understand that the transportation of cattle sold will have to be specially provided for, and the buyer pays a railroad for holding cars in readiness for cattle that the vendor fails to deliver, he may recover this amount as damages. Hockersmith v. Hanley (1896), 29 Oreg. 27, 44 Pac. R. 497.

³ Vickery v. McCormick (1888), 117 Ind. 594 [citing Louisville, etc. R. Co. v. Hollerbach, 105 Ind. 137; Pennsylvania R. Co. v. Titusville, etc. Co., 71 Pa. St. 350].

sale of its goods in a foreign country and agreed to supply the goods and give certain exclusive rights of sale, it was held that, upon repudiation by the company, the other parties might recover the profits which they could show with reasonable certainty would have resulted from the business.¹ And the same ruling was made where the manufacturer of goods failed to supply them at a time when they could not be obtained in the market, whereby the buyer lost the profit which he would have made on their resale.²

§ 1777. No damages for purely conjectural, speculative or remote losses.—Under no one of these rules, however, are damages to be recovered for losses which are uncertain, remote or speculative. Damages may be had, as has been already seen,³ for the loss of profits under existing contracts where the fact and the amount of that loss can be shown with reasonable certainty. But profits which the buyer contends he *might* have received upon contracts which he *might* have made are obviously too speculative and conjectural to be used as the foundation for a claim for damages.⁴

§ 1778. —. For like reason, profits which the plaintiff contends he would have made at some other business or with some other goods if he had not expected to receive the ones in question must also be ordinarily too remote.⁵ As said in a recent case, “the losses recoverable on breaches of contract are those directly connected with it and arising from the breach. The

¹ *Wakeman v. Wheeler & Wilson Mfg. Co.* (1886), 101 N. Y. 205, 54 Am. R. 676 (limiting *Taylor v. Bradley*, 39 N. Y. 129; distinguishing *Mitchell v. Read*, 84 N. Y. 556, and disapproving *Howe Machine Co. v. Bryson*, 44 Iowa, 159).

² *Bluegrass Cordage Co. v. Luthy* (1896), 98 Ky. 583, 33 S. W. R. 835.

³ See *ante*, §§ 1763 *et seq.*

⁴ See *Brigham v. Carlisle* (1884), 78 Ala. 243, *Mechem's Cases on Damages*, 152, and cases cited; *Sherman*

Center Town Co. v. Leonard (1891), 46 Kan. 354, 26 Pac. R. 717, 26 Am. St. R. 101, *Mechem's Cases*, 147, and cases cited *post*. § 1809.

⁵ In an action for breach of contract of sale of physician's practice, damages for the amount the purchaser would have made from professional practice given up, relying on the contract, do not arise from the breach complained of. *Rigney v. Monette* (1895), 47 La. Ann. 648, 17 S. R. 211.

law does not contemplate indemnity for profits which the party supposes he would have derived from some business he claims he would have pursued if he had not made the contract alleged to have been violated.”¹

§ 1779. —. And so, as between two possible methods by which the loss might be computed, the law prefers that which leads to the more certain and least speculative results. Thus, as has been seen,² the damages to be recovered for not supplying a machine or other article as agreed are usually the market value for which another may be procured, and not the profits which might have been made from its use. And, for like reasons, the damages to be recovered for the loss of the use of the property are to be estimated with reference to rental value³ or fair interest upon investment,⁴ and not upon the uncertain and speculative basis of the profit which might have been made from its use.

§ 1780. **Pleading special damages.**—For all those losses which are the usual and necessary consequences of the seller’s default, the buyer may recover damages without resorting to special allegations;⁴ but when the object is to recover for the unusual consequences — those which have actually happened in this case but do not necessarily or ordinarily happen,— the plaintiff must, in his pleadings, allege the special injury with

¹ Rigney v. Monette, *supra*.

² See *ante*, § 1761.

³ See, for example, Griffin v. Colver (1858), 16 N. Y. 489, 69 Am. Dec. 718, Mechem’s Cases on Damages (2d ed.), 126; Brownell v. Chapman (1892), 84 Iowa, 504, 51 N. W. R. 249, 35 Am. St. R. 326, Mechem’s Cases on Damages, 139. See also Sherman Center Town Co. v. Leonard (1891), 46 Kan. 354, 26 Pac. R. 717, 26 Am. St. R. 101, Mechem’s Cases on Damages, 147.

⁴ Paola Gas Co. v. Paola Glass Co. (1896), 56 Kan. 614, 44 Pac. R. 621, 54 Am. St. R. 598, citing many cases. Here it was held that the damages

to be recovered for not supplying gas as agreed for the operation of a glass factory in a country where glass making was a new and untried industry would be the fair rental value of the property thereby rendered idle, if it had a rental value, or, if not, then interest on the capital invested, and not the prospective profits which the business might have earned. The latter, under the circumstances, are too contingent, uncertain and speculative.

⁴ Smith v. Lime Co. (1898), 57 Ohio St. 518, 49 N. E. R. 695.

such particularity as reasonably to apprise the defendant of the origin, nature and extent of the losses for which damages will be sought.¹

2. *Where the Goods have been Delivered.*

§ 1781. Substantially the same remedies as the preceding.

Where, in pursuance of the contract of sale, or as part of it, or because of it, the goods have been delivered to the buyer before the transfer of the title, the buyer's remedies would ordinarily be, at least, those to which, as has been seen in the preceding sections, he would be entitled if the goods had not been delivered. He would, however, in addition, have the advantages which flow from possession. If, as in certain cases of the conditional contract to sell, he has no definite right to possession under the contract, his possession might not be of great avail; but if, by the terms of the contract, he is entitled to possession until default on his part, the law would protect his possession, and upon performance or tender of performance would confirm his title and thus put it beyond the seller's power to disturb it.

II.

WHERE THE TITLE HAS PASSED.

§ 1782. **In general.**—The question of the buyer's remedies, where the title has passed to him, may present two phases: (1) The seller, though the title has passed, may refuse to deliver the goods; or (2) though the title has passed and the goods are delivered, they prove not to be such in title, kind, quality or condition as they were expressly or impliedly warranted or represented to be. These two aspects may be separately considered.

¹ 1 Chitty on Pleading, 395; Treadwell v. Whittier (1889), 80 Cal. 575, 22 Pac. R. 266, 13 Am. St. R. 175; Stevenson v. Smith (1865), 28 Cal. 103, 87 Am. Dec. 107, Mechem's Cases on Damages, 70; Heister v. Loomis (1881), 47 Mich. 16, 10 N. W. R. 60, Mechem's Cases, 75; Wabash W. Ry. Co. v. Friedman (1892), 146 Ill. 583, 30 N. E. R. 353, 34 N. E. R. 1111, Mechem's Cases, 71.

1. *Where the Goods are not Delivered.*§ 1783. **Specific performance of agreement to deliver.**—

The mere fact that the title has passed does not necessarily warrant the conclusion that the buyer is entitled to immediate possession. The seller may be entitled to retain possession until some act is done, by virtue of an express term of the contract; and even in the absence of such an express term, the seller will, as has been seen,¹ have the right, unless he waives it, to retain possession by virtue of his lien until the price is paid.

But assuming that the buyer is entitled to the possession of the goods and that the seller's retention is wrongful, the buyer may, as has been seen, in cases involving special considerations, obtain a decree for the specific performance of the agreement to sell and to deliver.²

§ 1784. **Action for damages for breach of agreement to deliver.**—

It is, as has been seen,³ an implied if not an express term of the undertaking of the seller that he will not only transfer the title but will also deliver the goods to the buyer. How these duties are to be performed has already been considered,⁴ and the discussion need not be repeated here. If, therefore, the seller, having transferred the title, wrongfully refuses to deliver the goods, he violates his contract; and while the buyer has, as will be seen in following sections, the rights of an owner and may maintain trover or replevin, he has also, if he prefers to use them, the remedies based upon the breach of contract.

§ 1785. — **Measure of damages.**— By the total breach of the seller's undertaking to deliver the goods, the buyer is placed in substantially the same predicament as though the seller had wholly refused to sell. He loses the goods, and he may recover

¹ See *ante*, §§ 1474 *et seq.*§§ 14, 41; *Marsh v. Milligan* (1857), 3² See *ante*, §§ 1718 *et seq.* See also *Jurist* (N. S.), 979.*Fry on Specific Performance* (1892),³ See *ante*, §§ 1116 *et seq.*⁴ See *ante*, §§ 1112, 1116.

upon the basis of that loss — if he has paid the price, the full value of the goods;¹ if he has not paid the price, the difference between the contract price and the value of the goods;² if the goods were sold in contemplation of a special use, then the value for the use so contemplated may be made the basis.³ As to all of these matters, the rules already given will apply, and it seems unnecessary to repeat them.

§ 1786. Trover — Damages usually market value at time of conversion.— The buyer who has the title and is entitled to possession, instead of basing his action for damages upon the breach of the seller's contract to deliver, as suggested in the preceding section, may maintain an action of trover as for conversion against the seller who has refused to recognize the buyer's rights, or has wrongfully resold the property to another.⁴

The damages to be recovered in the action of trover are usually the value of the goods at the time of the conversion;⁵ but

¹ See *ante*, § 1741.

² See *ante*, §§ 1736–1740.

³ See *ante*, §§ 1771–1776.

⁴ *Kennedy v. Whitwell* (1827), 4 Pick. (Mass.) 466; *Philbrook v. Eaton* (1833), 134 Mass. 398. The wrongful resale constitutes the conversion, and not the subsequent refusal to surrender the goods upon demand. *Philbrook v. Eaton*, *supra*.

⁵ *Kennedy v. Whitwell*, *supra*; *Terry v. Birmingham Nat. Bank* (1890), 93 Ala. 599, 9 S. R. 299, 30 Am. St. R. 87; *Jones v. Horn* (1888), 51 Ark. 19, 9 S. W. R. 309; *Sturges v. Keith* (1870), 57 Ill. 451, 11 Am. R. 28; *Brewster v. Van Liew* (1886), 119 Ill. 554, 8 N. E. R. 842; *Thew v. Miller* (1887), 73 Iowa, 742, 36 N. W. R. 771; *Simpson v. Alexander* (1886), 35 Kan. 225, 11 Pac. R. 171; *Wing v. Milliken* (1898), 91 Me. 387, 40 Atl. R. 138, 64 Am. St. R. 238; *Hopper v. Haines*

(1889), 71 Md. 64, 18 Atl. R. 29, 20 Atl. R. 159; *Jellett v. St. Paul Ry. Co.* (1883), 30 Minn. 265, 15 N. W. R. 237; *Béede v. Lamprey* (1888), 64 N. H. 510, 15 Atl. R. 133, *Mechem's Cas. on Damages*, 389; *Griggs v. Day* (1892), 136 N. Y. 152, 32 N. E. R. 612, 32 Am. St. R. 704; *Crampton v. Marble Co.* (1888), 60 Vt. 291, 15 Atl. R. 153; *Ingram v. Rankin* (1879), 47 Wis. 406, 32 Am. R. 762; *Arkansas Valley L. & C. Co. v. Mann* (1888), 130 U. S. 69, 9 Sup. Ct. R. 458.

The fact that since the conversion, by a wrongful refusal to deliver upon payment and demand, and since the commencement of the action, the defendant has resold the goods at a price greater than the market price at the time of the conversion, does not entitle the plaintiff to damages based upon that increased price. *Kennedy v. Whitwell*, *supra*.

if the buyer has not paid the price, he recovers only to the extent of his interest, which will usually be the difference between the contract price and the market value at the time of the conversion.¹

§ 1787. — How when goods of fluctuating value — Stocks, bonds, etc.—The general rule, however, which bases the damages upon the market value of the goods at the time of the conversion, has been modified with respect of stocks, bonds, commercial securities and other property the market value of which is liable to frequent and great fluctuation caused by the depression and inflation of prices in the market.

There has been, in such cases, some tendency to hold that the measure of damages for the conversion of such securities should be the highest market price between the time of the conversion and the trial;² but the weight of authority, following the later cases in New York, permits the recovery only of the highest market value which the goods have reached between the date of the conversion and a reasonable time thereafter within which the plaintiff might have supplied himself with other goods of the same kind.³

§ 1788. — Because “more transactions of this kind arise in the State of New York than in all other parts of the country,” the supreme court of the United States adopted the New

¹ *Chinery v. Viall* (1860), 5 Hurl. & Norm. 287; *Mayne on Damages* (6th Eng. ed.), p. 416.

² See *Romaine v. Van Allen* (1863), 26 N. Y. 309; *Markham v. Jaudon* (1869), 41 N. Y. 235, now overruled by the later New York cases cited in the next note.

³ *Baker v. Drake* (1873), 53 N. Y. 211, 13 Am. R. 507; *Baker v. Drake* (1876), 66 N. Y. 518, 23 Am. R. 80; *Gruman v. Smith* (1880), 81 N. Y. 25; *Colt v. Owens* (1882), 90 N. Y. 368; *Wright v. Bank of Metropolis* (1888), 110 N. Y. 237, 18 N. E. R. 79, 6 Am. St. R.

356, 1 L. R. A. 289, *Mechem's Cas. on Damages*, 469; *Galigher v. Jones* (1888), 129 U. S. 193, 9 Sup. Ct. R. 335; *Andrews v. Clark* (1890), 72 Md. 396, 20 Atl. R. 429; *Fosdick v. Greene* (1875), 27 Ohio St. 484, 22 Am. R. 328; *Free-man v. Harwood* (1859), 49 Me. 195; *Fisher v. Brown* (1870), 104 Mass. 259, 6 Am. R. 235; *Walker v. Borland* (1855), 21 Mo. 289; *Brewster v. Van Liew* (1886), 119 Ill. 554, 8 N. E. R. 842, 59 Am. R. 823; *Galena, etc. R. Co. v. Ennor* (1888), 123 Ill. 505, 14 N. E. R. 673; *Hill v. Smith* (1859), 32 Vt. 433; *In-gram v. Rankin* (1879), 47 Wis. 406, 2

York rule, saying: "The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great that the court of appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. . . . It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the New York rule, as finally settled by the court of appeals, has the most reasons in its favor, and we adopt it as a correct view of the law."¹

2. *Where the Goods have been Delivered.*

§ 1789. **What questions arise.**—Where, however, the seller has not only done that which is necessary to pass the title, but has also delivered the goods into the possession of the buyer, different questions arise. It may happen that, though the seller may have delivered the goods and may have done all that would ordinarily be necessary to transfer the title, no title will in fact be conveyed because the seller had none; or, though the title may have been transferred, the goods may be subject to liens or incumbrances which detract from, if not destroy, their value.

N. W. R. 755, 32 Am. R. 762; Coffman v. Williams (1871), 51 Tenn. (4 Heisk.) 233; Jackson v. Evans (1880), 44 Mich. 510, 7 N. W. R. 79; Chadwick v. Butler (1873), 28 Mich. 349; Bates v. Stansell (1869), 19 Mich. 91.

In **Alabama**, see Burks v. Hubbard (1881), 69 Ala. 379.

In **Iowa**, see Gilman v. Andrews (1885), 66 Iowa, 116, 23 N. W. R. 291.

In **Indiana**, see Citizens' St. Ry. Co. v. Robbins (1895), 144 Ind. 671, 42

N. E. R. 916, 43 N. E. R. 649, 25 Am. St. R. 445.

In **Texas**, see Heilbronner v. Douglass (1876), 45 Tex. 402.

In **Pennsylvania**, see Huntington, etc. Coal Co. v. English (1878), 86 Pa. St. 247; North v. Phillips (1879), 89 Pa. St. 250; Work v. Bennett (1872), 70 Pa. St. 484; Neiler v. Kelley (1871), 69 Pa. St. 403.

¹ Galigher v. Jones (1888), 129 U. S. 193, 9 Sup. Ct. R. 335.

So, though the title may in fact have been transferred and the goods have been delivered, it may be found that the goods are not such in kind, quality or condition as they were expressly or impliedly warranted to be.

Three general groups of questions therefore present themselves:

- (a) Where the goods are delivered, but not at the time agreed upon.
- (b) Where the title fails in whole or in part.
- (c) Where the goods are defective in kind, quality or condition.

Each of these will be given separate consideration.

a. Where there was Delay in Delivery.

§ 1790. **Measure of damages for delayed delivery.**—The buyer who has accepted a delayed delivery is, unless he has waived his right,¹ entitled to damages for the delay. Of the loss by delay, in the ordinary case, the measure is the rental value for the period² and not the loss of profits which might have been made with the article during that period, certainly where such a use was not within the contemplation of the parties,³ nor, in any case, where the profits would be uncertain or speculative, as the amount of profit that might have been made by the buyer's mill if he had had the engine contracted for to operate it,⁴ or the profit that might have been made by operating an excursion steamer if the machinery had been supplied in time.⁵

¹ See *ante*, § 1389.

² Brownell v. Chapman (1892), 84 Iowa, 504, 51 N. W. R. 249, 35 Am. St. R. 326, Mechem's Cases on Damages, 139; Griffin v. Colver (1858), 16 N. Y. 489, 69 Am. Dec. 718, Mechem's Cases on Damages, 126; Benton v. Fay (1872), 64 Ill. 417. Interest on the price paid in advance may be recovered where no other damages are shown. Edwards v. Sanborn (1859), 6 Mich. 348. Depreciation in market

value during the delay may be recovered. Speirs v. Halstead (1876), 74 N. C. 620; Clements v. Hawkes Mfg. Co. (1871), 107 Mass. 362.

³ Thomas, etc. Mfg. Co. v. Wabash, etc. Ry. Co. (1885), 62 Wis. 642, 22 N. W. R. 827, Mechem's Cases on Damages, 149, where the defendant did not know the goods were bought for use, or, if so, for what use.

⁴ Griffin v. Colver, *supra*.

⁵ Brownell v. Chapman, *supra*.

§ 1791. —. Other damages than for the loss of use alone may, of course, in many cases be recovered under the second branch of the rule in *Hadley v. Baxendale*. Thus, for example, where the goods are known to be purchased for resale and the resales are lost by reason of the delay, recovery may be had for the profits that would have been made upon resales contracted for in reliance upon receiving the goods within the stipulated time; and even if no profit could be shown, the vendee would be entitled to damages for expenses incurred by him in good faith in anticipation of performance by the seller.¹

§ 1792. —. So where, as the natural and proximate result of the delay, the buyer is deprived of the profitable use of his property, as where the seller made default in supplying a new hotel with furniture at the time agreed, where he knew that such was the intended use, damages based upon this special loss may be recovered.² For like reasons, injuries to a farmer's crop caused by exposure to the weather while he was waiting for a threshing machine upon the seller's promise to furnish it forthwith, may be compensated, where the buyer could procure no other machine.³

b. Where Title Fails in Whole or in Part.

§ 1793. **Recovery of consideration.**—It is a fundamental condition, as has been seen,⁴ that the seller shall be the owner of that which he attempts to convey. If, therefore, he tenders a chattel to which the buyer knows he has no title, the buyer may reject it, and may recover the price if he has paid

¹ *Harrow Spring Co. v. Whipple* Harrow Co. (1892), 90 Mich. 147, 51 N. W. R. 197, 30 Am. St. R. 421. See also *Horne v. Midland Ry. Co.* (1872), L. R. 7 C. P. 583, *Mechem's Cases on Damages*, 124; *Booth v. Rolling Mill Co.* (1875), 60 N. Y. 487, *Mechem's Cases on Damages*, 132.

² *Berkey & Gay Furniture Co. v. Hascall* (1890), 123 Ind. 502, 24 N. E.

R. 336, 8 L. R. A. 65, *Mechem's Cases*, 252.

³ *Smeed v. Foord* (1859), 1 Ell. & Ell. 602, 102 Eng. Com. L. 600. See also *Goodloe v. Rogers* (1855), 10 La. Ann. 631; *Benton v. Fay* (1872), 64 Ill. 417. Compare *Prosser v. Jones* (1875), 41 Iowa, 674. Other cases are cited § 1773, *ante*.

⁴ See *ante*, § 1205.

it in advance. So if, after the delivery of the goods and the payment of the price, the buyer is divested by or surrenders to a superior title, there is likewise a breach of the fundamental condition of the sale,—the seller has ignored the contract on his part, and the buyer may treat it as a sufficient ground for the rescission of the contract on his own part. Acting, therefore, in *disaffirmance* of the contract, the buyer may recover, as paid without consideration, so much of the purchase price as he has paid to the seller, with interest.¹

§ 1794. **Damages for breach of warranty of title.**—As has been seen, however, this fundamental condition on the part of the seller to convey the title is treated not only as a condition but as a warranty;² and the buyer, instead of treating the seller's failure in this regard as a ground for disaffirmance of the contract, may recover damages for the breach of warranty.

What the measure of damages for the breach of warranty of title should be seems to be involved in some confusion. Certain of the cases, acting in analogy to the rule generally prevailing in regard to real estate, declare the rule to be that the buyer shall recover the consideration paid with interest.³

Other cases declare, in the language of one of the most re-

¹ See *ante*, § 838; *Wilkinson v. Ferree* (1855), 24 Pa. St. 190; *Ledwich v. McKim* (1873), 53 N. Y. 307; *Eicholtz v. Bannister* (1864), 17 Com. B. (N. S.) 708.

² See *ante*, § 1300 *et seq.*

³ *Crittenden v. Posey* (1858), 38 Tenn. (1 Head), 311; *Johnson v. Meyers* (1863), 34 Mo. 255; *Ellis v. Gosney* (1832), 7 J. J. Marsh. (Ky.) 109; *Anding v. Perkins* (1867), 29 Tex. 348; *Goss v. Dysant* (1868), 31 Tex. 186; *Armstrong v. Percy* (1830), 5 Wend. (N. Y.) 535; *Noel v. Wheatly* (1855), 30 Miss. 181; *Ware v. Wheatnall* (1823), 2 McCord (S. C.), 413; *Arthur v. Moss*, 1 Oreg. 193.

Partial breach.—For a partial failure of title, the buyer may re-

cover such a portion of the whole price as the value of the part lost bears to the value of the whole, estimated at the price paid. *Moorehead v. Davis* (1883), 92 Ind. 303 [citing *Wiley v. Howard*, 15 Ind. 169; *Hoot v. Spade*, 20 Ind. 326; *First Nat. Bank v. Colter*, 61 Ind. 153; *Mooney v. Burchard*, 84 Ind. 285].

Where two mules and a colt were sold for a lump sum, and the purchaser lost the colt by paramount title, *held*, that he could recover the value of the colt at the time he so lost it, although no separate price had been fixed for it. *Brown v. Woods* (1866), 43 Tenn. (3 Cold.) 182. See also *Hunt v. Sackett* (1875), 31 Mich. 18.

cent,¹ that “unless we are to lose sight of the cardinal principle which governs when estimating and awarding damages in civil actions, which is simply compensation to the injured party, . . . the damages are the actual loss, which is the value of the chattel purchased . . . depending on the real value of the chattel when the paramount title was asserted as against the vendee.”²

§ 1795. — **When right of action accrues.**—“There is no doubt,” said Nelson, C. J., in a leading case in New York,³ that “if the vendor *fraudulently* represents the goods sold to be his own, when he knows them to belong to a stranger, an action on the case lies to recover damages therefor, though the real owner has not recovered the property, nor the vendee suffered any actual damage.”

With respect, however, of actions upon the warranty some distinction has been made between the express and the implied warranty. As to the former it is said that the authorities are uniform that there is no breach until the vendee's possession

¹ *Hendrickson v. Back* (1898), 74 Minn. 90, 76 N. W. R. 1019. In the court below it was held that the price paid furnished the measure. The supreme court said: “We call attention to the fact that in a number of the text books on the subject of damages the rule adopted by the trial court is laid down, and cases cited in support of it. An examination of these cases will show that, with two or three exceptions, they do not sustain the rule, and quite a number are authority for what we believe to be the only just doctrine.” *Close v. Crossland*, 47 Minn. 500, 50 N. W. R. 694, was cited as in accord.

² This rule is strongly supported in *Hoffman v. Chamberlain* (1885), 40 N. J. Eq. 663, 5 Atl. R. 150, *Mechem's Cases on Damages*, 250, citing *Grose v. Hennessey* (1866), 13 Allen (Mass.),

389; *Rowland v. Shelton* (1854), 25 Ala. 217, and *Sedgwick on Damages*, 294. To like effect: *Marlatt v. Clary* (1859), 20 Ark. 251; *Brown v. Pierce* (1867), 97 Mass. 46, 93 Am. Dec. 57. See also *Brown v. Wood* (1866), 43 Tenn. (3 Cold.) 182. In *Dabovick v. Emeric* (1859), 12 Cal. 171, the damages for breach of warranty of title to growing fruit sold were allowed as for a breach of failure to furnish a chattel.

³ *Case v. Hall* (1840), 24 Wend. 102, 35 Am. Dec. 605 [citing *Cross v. Gardner*, 1 Show. 68; *Dale's Case*, Cro. Eliz. 44; *Medina v. Stoughton*, 1 Salk. 210; s. c., 1 Ld. Raym. 593; *Selw. N. P.* 482, 483, and cases; *Springwell v. Allen*, in note to *Williamson v. Allison*, 2 East, 448, n.; *Ross on Vendors*, 334].

has in some way been disturbed by reason of the paramount title;¹ as to the latter it has been suggested that there was an immediate breach.² This distinction has not been generally approved, though the authorities are by no means uniform that actual ouster or surrender is essential in all cases.³ That seems, however, to be the prevailing rule. Thus in a late case⁴ it is

¹ *Gross v. Kierski* (1871), 41 Cal. 111.

² *Gross v. Kierski*, *supra*, citing the following Kentucky cases: *Payne v. Rodden*, 4 Bibb, 304; *Scott v. Scott*, 2 A. K. Marsh. 217; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Tipton v. Triplett*, 1 Metc. 570.

³ Thus in *Perkins v. Whelan* (1875), 116 Mass. 542, it is held that an action for breach of the warranty of title implied in the sale of a chattel accrues at the time of the sale, and statute of limitations runs from that time. To like effect: *Scott v. Scott's Adm'r* (1820), 2 A. K. Marsh. (Ky.) 217. In *Wood v. Cavin* (1858), 38 Tenn. (1 Head), 506, while the court say that the warranty was broken when made, it is also said that the statute of limitation began to run from the time of dispossession.

⁴ *Hull v. Caldwell* (1893), 3 S. Dak. 451, 54 N. W. R. 100. That the buyer, in order to recover damages or defeat recovery of the price, must show that he has been dispossessed by or has yielded to the paramount title, see *Burt v. Dewey* (1869), 40 N. Y. 283, 100 Am. Dec. 482; *O'Brien v. Jones* (1883), 91 N. Y. 193; *Gross v. Kierski* (1871), 41 Cal. 111; *Wanser v. Messler* (1861), 29 N. J. L. 256; *Linton v. Porter* (1863), 31 Ill. 107; *Krumhaar v. Birch* (1877), 83 Pa. St. 426; *Close v. Crossland* (1891), 47 Minn. 500, 50 N. W. R. 694.

In *Johnson v. Oehmig* (1891), 95 Ala. 189, 10 S. R. 657, 36 Am. St. R. 204, it is said: "In an action by a

vendee of personal property against his vendor for a breach of warranty of title, only damages for actual loss can be recovered. The plaintiff in such an action must not only establish that his vendor is without title to the property sold, and that another is the true owner, but also that he has restored the property to such owner; that it has been taken from him under compulsory proceedings, or that he has parted with money or property in consequence of a judgment obtained against him, or voluntarily in answer to a claim made for the property. *O'Brien v. Jones*, 91 N. Y. 193. In *Harris v. Rowland*, 23 Ala. 644, the property sold had been recovered on the adverse title. No such state of facts is shown by the second plea in this case. It is not averred that the defendants have in any way been disturbed in their possession of the property. If that possession remains undisturbed, their title will be perfected by lapse of time. If a paramount title is asserted, the plaintiffs may settle with the adverse claimant, or they will be answerable in damages on their warranty of title, if the defendants shall be required to deliver up the property in response to a claim by one who may prove to be the true owner. So long as the vendee of personal property remains in undisturbed possession, he cannot recover damages in an action on an implied warranty of title, or set up the want of title in

said: "A vendee, in the case of an executed sale, has no right of action on the implied warranty of title until he is deprived of the possession of the property, and the same principle applies to pleading such warranty as a defense." "Possibly the owner may never claim and enforce his title, or, if he does, the seller may settle with him. The breach implies no bad faith, and, therefore, is compatible with perfect fair dealing between the parties; and the indemnity is complete by responding therefor after a recovery under the paramount title."

§ 1796. — **What constitutes eviction.**—"The rule in cases of warranty, express or implied," it is further said,² "was derived from the analogy to that adopted in cases of covenants of quiet enjoyment in conveyances of real estate. An eviction is an essential prerequisite to a recovery in the latter class of cases. Yet this need not be by process of law. It is enough that on a valid claim made by a third person, under title paramount, the plaintiff voluntarily yielded up possession. If this is done without legal contest, the plaintiff must prove that the title to which he yielded was paramount to that acquired by him under his deed from the defendant.³ The rule adopted in these cases has been regarded since as the law of the State, and as such applied to like cases. Actions for a breach of war-

his vendor as a defense to an action for the purchase-money, unless there were fraudulent representations made by the vendor in regard to the title. Such a vendee in peaceable possession has nothing substantial to complain of in the fact that the vendor was not the true owner of the property. When nothing more is shown than that he may suffer loss in the future, in consequence of the outstanding claim to the property, he must rely upon his warranty, and he cannot sue thereon until he has suffered damages because of its breach. *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605, and note; *Sumner v. Gray*, 4

Ark. 467, 38 Am. Dec. 39; *Burt v. Dewey*, 40 N. Y. 282, 100 Am. Dec. 482, and note; 2 Benjamin on Sales (Corbin's ed.), secs. 948 and 1347, and notes. There was no error in sustaining the demurrer to the second plea."

¹ *Case v. Hall*, *supra*.

² *Bordwell v. Collie* (1871), 45 N. Y. 494. See also *O'Brien v. Jones* (1883), 91 N. Y. 193.

³ Citing *Greenvault v. Davis*, 4 Hill (N. Y.), 643; *St. John v. Palmer*, 5 Hill, 599. See also *Matheny v. Mason* (1881), 73 Mo. 677, 39 Am. R. 541.

ranty, express or implied, upon a sale of personal property are within the same principle in this respect and require the application of the same rule. To hold that a purchaser of personal property must become a wrong-doer by withholding it from the true owner, and compel him to resort to an action for its recovery, to entitle him to redress for a breach of warranty of title, would be absurd. Such a rule cannot be supported by reason or sound policy.”¹

§ 1797. — **Warranty broken by incumbrances.**—The warranty of title which the law implies is, as has been seen,² a warranty of the whole title and protects the purchaser against liens and incumbrances.³ The mere existence of such an incumbrance, therefore, constitutes a technical breach for which nominal damages may be recovered,⁴ and if the buyer has been dispossessed by it, or has removed it reasonably and in good faith,⁵ he may recover actual damage.⁶ If the incumbrance be permanent, a recovery to the extent of the actual injury may be had.⁷

§ 1798. — **Evidence of eviction — Judgment — Costs of suit.**—Although, as has been seen,⁸ the purchaser is not bound to wait for an action at law against him, the fact that he has been compelled to yield to a paramount title may be shown in many cases by the judgment recovered against him. “If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action

¹To like effect: *McGiffin v. Baird* (1875), 63 N. Y. 329; *Read v. Slaton* (1816), 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740.

²*Ante*, § 1304.

³*Close v. Crossland* (1891), 47 Minn. 500, 50 N. W. R. 694; *Hall v. Aitkin* (1889), 25 Neb. 360, 41 N. W. R. 192; *Hickman v. Dill* (1889), 39 Mo. App. 246; *Dresser v. Ainsworth* (1850), 9 Barb. (N. Y.) 619; *Hodges v. Wilkinson* (1892), 111 N. C. 56, 15 S. E. R.

941, 17 L. R. A. 545; *Sargent v. Currier* (1870), 49 N. H. 310, 6 Am. R. 524.

⁴*Close v. Crossland*, *supra*.

⁵He must not of course pay an unreasonable or unnecessary amount. *Guthrie v. Russell* (1877), 46 Iowa, 269, *Mechem's Cases on Damages*, 298.

⁶*Sargent v. Currier*; *Close v. Crossland* and other cases, *supra*.

⁷2 *Sutherland on Damages*, 326.

⁸*Ante*, § 1796.

and its nature, the judgment is conclusive evidence against such vendor. If no notice is given, it is not conclusive on him, but he may show that the plaintiff, in a suit against him on his warranty, ought not to recover the amount he has paid, because the case was not properly defended, and judgment was suffered unnecessarily."¹

In addition to his other damages, the buyer, who has given his vendor notice of the action to enforce the paramount title, and an opportunity to defend it, may recover not only the costs paid to the successful party,² but also, usually, the necessary costs of his defense,³ including, it is held, his attorney's fees.⁴

c. Where Goods Defective in Kind, Quality or Condition.

§ 1799. **In general.**—The question of the remedies of the buyer where goods sold and delivered prove defective in kind, quality or condition presents a variety of aspects. There may have been no warranty; there may have been a warranty express or implied; the sale may have been induced by fraud; the vendee may have sought to protect himself by express stipulations as to his rights or remedies if the goods proved to be defective. A detailed examination of certain of these aspects is necessary.

¹Thurston v. Spratt (1863), 52 Me. 202 [citing French v. Parish, 14 N. H. 496; Duffield v. Scott, 3 D. & E. 210; Blasdale v. Babcock, 1 Johns. (N. Y.) 517; Weld v. Nichols, 17 Pick. 538; Kipp v. Bingham, 6 Johns. (N. Y.) 157]. *Accord*, where there was notice and opportunity to defend: Ryerson v. Chapman (1877), 66 Me. 557; Barney v. Dewey (1816), 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; but not otherwise: Buchanan v. Kauffman (1885), 65 Tex. 235; Fallon v. Murray (1852), 16 Mo. 168; Clements v. Collins (1877), 59 Ga. 124; Salle v. Light (1843), 4 Ala. 700, 39 Am. Dec. 317.

²Armstrong v. Percy (1830), 5 Wend. (N. Y.) 535; *ante*, § 1769.

³Rowland v. Shelton (1854), 25 Ala. 217; Johnson v. Meyers (1863), 34 Mo. 255; Marlatt v. Clary (1859), 20 Ark. 251.

⁴Balte v. Bedemiller (1900), — Oreg. —, 60 Pac. R. 601. See also Harding v. Larkin (1866), 41 Ill. 413; Thurston v. Spratt (1863), 52 Me. 202; Ryerson v. Chapman (1877), 66 Me. 557; Allis v. Nininger (1879), 25 Minn. 525. *Contra*: Reggio v. Braggiotti (1851), 7 Cush. (Mass.) 166; Clark v. Mumford (1884), 62 Tex. 531.

§ 1800. **Caveat emptor.**—The simplest case will be that in which there has been a present sale of a known and ascertained chattel, without fraud, without any express warranty, and without any circumstances or conditions to raise an implied warranty. Here, as has been seen,¹ the rule of the common law is *caveat emptor* and the purchaser is without any remedy whatever.

§ 1801. **Express stipulations for return or other remedy.** As has been seen, the parties may by express stipulation provide that in case the goods prove defective the buyer may return them, and either have others in their place or have a rescission of the contract and a release from its obligations.²

The contract may make such a return the *only* remedy of the buyer, and in that case if he fails to avail himself of it he will have no other.³

Usually, however, such a remedy will be an optional one, and the buyer at his election may either return the goods or keep them and have such remedy as the law provides.⁴

§ 1802. **Rejection of goods.**—As has also been seen, the buyer under an executory contract of sale has the right to insist that the goods supplied under it shall be such in kind, quality or condition as the contract provides. If, therefore, though he may have received the goods, he subsequently finds that they are not such as he was bound to receive, he may, by acting fairly and with reasonable promptness, reject the goods and repudiate his obligation.⁵

§ 1803. —. So, as has been seen,⁶ the buyer has a right to insist upon the quantity of goods agreed upon. He may know-

¹ See *ante*, § 1311 *et seq.*

² See *ante*, § 823.

³ See *ante*, § 1396.

⁴ *Blacknall v. Rowland* (1896), 118 N. C. 418, 24 S. E. R. 1.

⁵ See *ante*, § 1375. Under an express warranty upon an *executory* contract of sale, if the articles furnished do not correspond to the war-

ranty, the buyer may return them and rescind; and if the seller refuses to receive them the buyer must take measures to avoid unnecessary loss: and if he sells them he is responsible only for the proceeds. *Rubin v. Sturtevant* (1897), 51 U. S. App. 286, 80 Fed. R. 930, 26 C. C. A. 259.

⁶ See *ante*, § 1390.

ingly accept a part only and become liable for that part;¹ he may, in many cases, accept part and recover damages for the non-delivery of the residue;² but where he has accepted part in reliance upon the delivery of the residue under an entire contract, he may, if he so elects, rescind the contract and return the part received.³

§ 1804. Rescission for fraud.—In an earlier chapter attention has been given to the cases in which the buyer who has been induced to purchase through the fraudulent representations or practices of the seller may rescind the contract and recover what he has parted with in pursuance of it. Any further discussion of that question in this place seems unnecessary, and a reference to the previous discussion must suffice.⁴

§ 1805. Rescission for breach of warranty.—It has been seen to be the general rule that in the case of the executed sale of a specific chattel—as distinguished from the executory contract to sell a chattel not then ascertained—no rescission can be had for a mere breach of warranty unaccompanied by fraud or an agreement to rescind.⁵ In some States, however,

¹ See *ante*, § 1390.

² See *ante*, § 1398.

³ Where a contract of sale is entire and indivisible, though including several distinct articles, failure as to any one on the part of the seller gives the buyer a right to rescind. *McCormick Mach. Co. v. Courtright* (1898), 54 Neb. 18, 74 N. W. R. 418, citing *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22, 36 Pac. R. 799.

⁴ See *ante*, § 930 *et seq.*

⁵ See *ante*, § 816; *Street v. Blay* (1831), 2 B. & Ad. 456, 22 Eng. Com. L. 193; *Gompertz v. Denton* (1832), 1 Cr. & M. 207; *Dawson v. Collis* (1851), 10 C. B. 523, 70 Eng. Com. L. 522; *Thornton v. Wynn* (1827), 25 U. S. (12 Wheat.) 183; *Lyon v. Bertram* (1857), 61 U. S. (20 How.) 149; *Voor-*

hees v. Earl (1842), 2 Hill (N. Y.), 288, 38 Am. Dec. 588; *Cary v. Gruman* (1843), 4 Hill (N. Y.), 625, 40 Am. Dec. 299; *Muller v. Eno* (1856), 14 N. Y. 597; *Day v. Pool* (1873), 52 N. Y. 416, 11 Am. R. 719; *Kase v. John* (1840), 10 Watts (Pa.), 107, 36 Am. Dec. 148; *Lightburn v. Cooper* (1833), 1 Dana (Ky.), 273; *Trumbull v. O'Hara* (1898), 71 Conn. 172, 41 Atl. R. 546; *Allen v. Anderson* (1842), 3 Humph. (Tenn.) 581, 39 Am. Dec. 197; *Lynch v. Curfman* (1896), 65 Minn. 170, 68 N. W. R. 5; *Close v. Crossland* (1891), 47 Minn. 500, 50 N. W. R. 694; *Hoadly v. House* (1859), 32 Vt. 179, 76 Am. Dec. 167; *Matteson v. Holt* (1873), 45 Vt. 336. In New Hampshire, see *Chase v. Willard* (1892), 67 N. H. 369, 39 Atl. R. 901. Under the California code (Civ.

as in Massachusetts,¹ Maine,² Maryland,³ Missouri,⁴ Alabama,⁵ Iowa,⁶ Kansas⁷ and Wisconsin,⁸ it seems that rescission may be had for mere breach of warranty, if it be seasonably sought and the other party be restored to *statu quo*.

§ 1806. — **In pursuance of agreement.**—The contract of sale, moreover, as has been seen, may expressly provide for a return of the article or a rescission of the contract if the chattel proves not to be as warranted. Such an agreement, of course, will give the right where the rules of law might not otherwise permit it.⁹

The buyer, however, if he would avail himself of this con-

Code, § 1786), see *First Nat. Bank v. Hughes* (1896), 46 Pac. R. 272. In Nebraska, see *McCormick Harv. Mach. Co. v. Knoll* (1899), 57 Neb. 790, 78 N. W. R. 394.

Bryant v. Isburgh (1859), 13 Gray, 607, 74 Am. Dec. 655; *Smith v. Hale* (1893), 158 Mass. 178, 33 N. E. R. 493, 35 Am. St. R. 485.

² *Milliken v. Skillings* (1896), 89 Me. 180, 36 Atl. R. 77 [citing *Marston v. Knight* (1849), 29 Me. 341; *Cutler v. Gilbreth*, 53 Me. 176; *Farrow v. Cochran*, 72 Me. 309]. See also *Marshall v. Perry* (1877), 67 Me. 78; *Libby v. Haley* (1898), 91 Me. 331, 39 Atl. R. 1004.

³ *Franklin v. Long* (1836), 7 Gill & J. (Md.) 407.

⁴ *Branson v. Turner* (1883), 77 Mo. 489; *Johnson v. Whitman Agl. Works* (1885), 20 Mo. App. 100.

⁵ *Thompson v. Harvey* (1888), 86 Ala. 519, 5 S. R. 825; *Hodge v. Tufts* (1896), 115 Ala. 366, 22 S. R. 422.

⁶ *Rogers v. Hanson* (1872), 35 Iowa, 283; *Upton Mfg. Co. v. Huiske* (1886), 69 Iowa, 557, 29 N. W. R. 621. See also *Eagle Iron Works v. Des Moines Suburban Ry. Co.*, 101 Iowa, 289, 70 N. W. R. 193.

⁷ *Weybrich v. Harris* (1883), 31 Kan. 92; *Gale Sulky-Harrow Mfg. Co. v. Stark* (1891), 45 Kan. 606, 26 Pac. R. 8, 23 Am. St. R. 739.

⁸ *Boothby v. Scales* (1871), 27 Wis. 626; *Croninger v. Paige* (1880), 48 Wis. 229; *Parry Mfg. Co. v. Tobin* (1900), 106 Wis. 286, 82 N. W. R. 154.

Illinois, on the strength of *Sparling v. Marks* (1877), 86 Ill. 125, is sometimes included in this list; but that this is not the view in that State, see *Kemp v. Freeman* (1891), 42 Ill. App. 500; *Crabtree v. Kile* (1839), 21 Ill. 180; *Owens v. Sturges* (1873), 67 Ill. 366.

In Louisiana, under the code, article 2520, the sale may be avoided "on account of some vice or defect in the thing sold, which renders it either useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice." *Flash v. American Glucose Co.* (1886), 38 La. Ann. 4.

⁹ See *ante*, § 821; *McCormick Harvesting Mach. Co. v. Knoll* (1899), 57 Neb. 790, 78 N. W. R. 394.

tract right to rescind or return the goods, must proceed within the time and in the manner which the contract stipulates, and a failure to do so will defeat his right.¹

§ 1807. — Waiver of special remedy — Suit for breach of warranty.—These special provisions for the return of the goods if they do not comply with the warranty or other agreement may, of course, be couched in such terms as to make such a return the exclusive remedy.² In the ordinary case, however, the language used is permissive and not mandatory, as, for example, that the buyer may return it or that the seller agrees to receive it back if not satisfactory; and in such cases it is well settled that the buyer, at his option, may avail himself of the special remedy, or waive it and sue at law for the breach of warranty.³

¹ See *ante*, § 824; *Gaar v. Hicks* (1897, Tenn. Ch.), 42 S. W. R. 455; *McCormick Mach. Co. v. Brower* (1895), 94 Iowa, 144, 62 N. W. R. 700; *Aultman v. Gunderson* (1894), 6 S. Dak. 226, 60 N. W. R. 859.

Where a test has been so long delayed that the capacity of the machinery to come up to the terms of the warranty is impaired, or if the right of rescission has been so long delayed as to show a waiver of the warranty, the purchaser has lost both his right to rescind and his action on the warranty. *Gray v. Consolidated Ice Machine Co.* (1897), 103 Ga. 115, 29 S. E. R. 604.

A purchaser of a pony with an option to return it within six months if dissatisfied is not obliged to return it when it is choked to death the night after the purchase by a slip-halter put on at the instance of the seller. Nor does he act arbitrarily in rescinding under those circumstances. *Lyons v. Stills* (1896), 97 Tenn. 514, 37 S. W. R. 280.

² See *ante*, § 1396; *Hills v. Bannister* (1827), 8 Cow. (N. Y.) 32 (where a church bell was sold with a warranty that it would not crack within a year, and that if it did so crack the seller would recast it. *Held*, that seller was not liable on his warranty without notice and a neglect to recast); *Himes v. Kiehl* (1893), 154 Pa. St. 190, 25 Atl. R. 632. See also *post*, § 1812.

³ *Elwood v. McDill* (1898), 105 Iowa, 437, 75 N. W. R. 340; *Love v. Ross* (1893), 89 Iowa, 400, 56 N. W. R. 528; *Hefner v. Haynes* (1893), 89 Iowa, 616, 57 N. W. R. 421; *Eyers v. Haddem* (1895), 70 Fed. R. 648 [citing also *Shupe v. Collender*, 56 Conn. 489, 15 Atl. R. 405; *Fitzpatrick v. Osborne*, 50 Minn. 261, 52 N. W. R. 861; *Mandel v. Buttles*, 21 Minn. 391; *Osborne v. McQueen*, 67 Wis. 392, 29 N. W. R. 636; *Park v. Richardson*, 81 Wis. 399, 51 N. W. R. 572; *Kemp v. Freeman*, 42 Ill. App. 500; *Perrine v. Serrell*, 30 N. J. L. 454].

As said by Metcalf, J., in one case: "When a seller, in addition to a warranty of property, makes a promise to take it back if it does not conform to the warranty, we cannot hold that such superadded provision rescinds and vacates the contract of warranty. We are of the opinion that in such case the buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of the warranty."¹

§ 1808. **Option where law gives the right to rescind.**—For like reasons, in those States in which, contrary to the general rule, the law gives the right to rescind for mere breach of warranty, the buyer is not bound to rescind: he may do so, or may retain the article and rely upon an action for his remedy.²

§ 1809. **Action for breach of warranty.**—If the buyer cannot rescind the contract or restore the property, or, though he may do so, if he chooses not to, his remedy will be either an action at law to recover damages for the breach of the warranty, or, in some cases, an action of tort for the deceit.³ Speaking first of actions for breach of warranty, the inquiry may be raised —

§ 1810. **What form of action — Contract or tort? —** With respect of the implied warranty, a contract action — at common law an action of *assumpsit* — is the appropriate remedy. But with reference to express warranties, it was said by the supreme court of the United States:⁴ "The ancient remedy for a false warranty was an action on the case sounding in tort."⁵ The remedy by *assumpsit* is comparatively of modern introduction. In *Williamson v. Allison*,⁶ Lord Ellenborough said

¹ Douglass Axe Mfg. Co. v. Gardner (1852), 10 Cush. (Mass.) 88.

² Graff v. Osborne Co. (1895), 56 Kan. 162, 42 Pac. R. 704; Douglass Axe Mfg. Co. v. Gardner, *supra*. See also Brigg v. Hilton (1885), 99 N. Y. 517, 52 Am. R. 63.

³ As to this, see *post*, § 1839.

⁴ Schuchardt v. Allens (1863), 68 U. S. (1 Wall.) 359. Cited and followed in Shippen v. Bowen (1886), 122 U. S. 575.

⁵ Citing Stuart v. Wilkins, 1 Doug. 18; Williamson v. Allison, 2 East, 447.

⁶ 2 East, 447.

it had 'not prevailed generally above forty years.' In *Stuart v. Wilkins*,¹ Lord Mansfield regarded it as a novelty, and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted.² Whether the declaration be in *assumpsit* or tort, it need not aver a *scienter*. And if the averment be made it need not be proved.³ One of the considerations which led to the practice of declaring in *assumpsit* was that the money counts might be added to the special counts upon the warranty.⁴ If the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. 'Either will sustain the action.'⁵

§ 1811. Notice of defects — Offer to return.—In the ordinary case of breach of warranty, either express or implied, notice of the defect or an offer to return the property to the

¹ 11 Doug. 18.

² Declaration for breach of warranty may be in tort or *assumpsit*, as the plaintiff may elect. *Bartholomew v. Bushnell* (1850), 20 Conn. 271, 52 Am. Dec. 338. It is not necessary in pleading, where a party relies upon a general warranty, to state whether the warranty was express or implied. A general averment that the seller warranted the article is sufficient. *Hoe v. Sanborn* (1860), 21 N. Y. 552, 78 Am. Dec. 163. A declaration for breach of warranty of soundness of a horse which alleges that the horse was unsound is sufficient without specifying the particular form of unsoundness. *Wheeler v. Wheelock* (1860), 33 Vt. 144, 78 Am. Dec. 617. But if plaintiff declares on an express warranty without alleging fraud, he must prove the express warranty and cannot recover on proof of fraud only. *West v. Emery* (1845), 17 Vt. 583, 44 Am. Dec. 356.

³ [Citing *Williamson v. Allison*, *supra*; *Gresham v. Postan*, 2 Car. & P. 540; *Brown v. Edgington*, 2 Man. & Gr. 279; *Holman v. Dord*, 12 Barb. (N. Y.) 336; *House v. Fort*, 4 Blackf. (Ind.) 293; *Trice v. Cockran*, 8 Gratt. (Va.) 442, 56 Am. Dec. 151; *Lassiter v. Ward*, 11 Ired. (N. C.) L. 443.] See also *Beeman v. Buck* (1830), 3 Vt. 53, 21 Am. Dec. 571; *Bartholomew v. Bushnell*, *supra*; *Hillman v. Wilcox*, 30 Me. 170; *Osgood v. Lewis*, 2 H. & G. (Md.) 495, 18 Am. Dec. 317; *Swayne v. Waldo*, 73 Iowa, 749, 33 N. W. R. 78, 5 Am. St. R. 712. But in *McGlade v. McCormick* (1895), 57 N. J. L. 430, 31 Atl. R. 460, it is held that in an action of tort founded on a fraudulent warranty of soundness of a horse, the defendant's *scienter* must be proved.

⁴ Citing *Williamson v. Allison*, *supra*.

⁵ Citing *Vail v. Strong*, 10 Vt. 457; *Brown v. Edgington*, *supra*.

seller is not in any respect a condition precedent to the buyer's right to maintain an action for the breach of warranty,¹ although, as is pointed out by Mr. Benjamin, his "failure to return the goods, or complain of the quality, raises a strong presumption that the complaint of defective quality is not well founded." So, obviously, the buyer is not bound to request the seller to remove the article or to replace it with another, in the absence of an agreement so to do.²

§ 1812. — **Conditional warranty.**— The parties may, however, by their contract expressly stipulate for notice of the defect and an opportunity to remedy it, or for a return of the article and an opportunity to substitute a perfect one in its place, before the seller's contract shall be deemed to be finally broken; and where they have done so, notice and opportunity of the kind stipulated and at the time and under the circumstances specified is, unless waived, a condition precedent to the buyer's right to maintain an action for the breach of warranty.³

§ 1813. —. So it has been held competent for the parties to stipulate that the failure of the buyer to settle for the goods, *e. g.*, machinery, "at the time and place of delivery . . . shall be a waiver of the warranty and release the warrantor, without in any way affecting the liability of the purchaser for the price of the machinery or the notes given therefor." Under

Morse v. Moore (1891), 83 Me. 473, 22 Atl. R. 362, 23 Am. St. R. 783, 13 L. R. A. 224; Vincent v. Leland (1868), 100 Mass. 432; Richardson v. Grandy (1876), 49 Vt. 22; Best v. Flint (1886), 58 Vt. 543, 5 Atl. R. 192; Tacoma Coal Co. v. Bradley (1891), 2 Wash. 600, 27 Pac. R. 454, 26 Am. St. R. 890; Larson v. Aultman (1893), 86 Wis. 281, 56 N. W. R. 915, 39 Am. St. R. 893, citing many other Wisconsin cases.

² Williams v. Thrall (1898), 101 Wis. 337, 76 N. W. R. 599.

³See *ante*, § 824; Trapp v. New Birdsall Co. (1898), 99 Wis. 458, 75 N. W. R. 77; Aultman v. Gunderson (1894), 6 S. Dak. 226, 60 N. W. R. 859; McCormick Mach. Co. v. Brower (1895), 94 Iowa, 144, 62 N. W. R. 700; Gaar v. Hicks (1897, Tenn. Ch.), 42 S. W. R. 455; Lewis v. Hubbard (1878), 1 Lea (Tenn.), 436, 27 Am. R. 775. A condition for the return of the article to a particular place must be complied with. Tyler v. Augusta. (1896), 88 Me. 504, 34 Atl. R. 406.

such a contract the failure of the buyer, without legal excuse, to settle for the goods as agreed, is held to be a waiver of the warranty.¹

§ 1814. Vendee not bound to anticipate or search for defects.—The purchaser of goods with warranty, moreover, is not bound to anticipate that it will be broken, or to search for imperfections in the goods before using them or putting them to the use for which they were purchased.² He has, of course, no right to unnecessarily aggravate his injury by attempting to use goods obviously unfit,³ but where the defects are not obvious he may rely upon the seller's warranty that none exist and act accordingly.

§ 1815. Who liable for breach of warranty — Principal — Agent.—The person responsible for the breach of warranty is usually the seller himself. He may, as has been seen, in many cases be liable upon a warranty made by his agent.⁴ Even though undisclosed at the time, he may, when discovered, be held liable upon a warranty made by one who was really his agent for that purpose.⁵

¹Robinson v. Berkey (1896), 100 Iowa, 136, 69 N. W. R. 434, 62 Am. St. R. 549 [citing Davis v. Robinson, 67 Iowa, 355, 71 Iowa, 618].

A vendee cannot defend an action for the price of a machine by showing that it failed to do good work, under a warranty to that effect, when by the contract no machine was to be delivered to a customer of the vendee without first being settled for, and the vendee failed to observe this stipulation. Warren & Durfee Mfg. Co. v. Watson (1894), 92 Iowa, 759, 60 N. W. R. 481.

²Tacoma Coal Co. v. Bradley (1891), 2 Wash. 600, 27 Pac. R. 454, 26 Am. St. R. 890.

³Milwaukee Boiler Co. v. Duncan (1894), 87 Wis. 120, 58 N. W. R. 232, 41 Am. St. R. 33.

In *Haltiwanger v. Tanner* (1897), 103 Ga. 314, 29 S. E. R. 965, it is held that one who, with the knowledge of the seller, purchases for the purpose of resale goods which are warranted, is under no obligation to investigate the goods with a view to detecting latent defects, but may rely upon the warranty.

In *South Bend Pulley Co. v. Caldwell Co.* (Ky., 1899), 54 S. W. R. 12, pulleys were sold with a warranty, but the defects were not discovered for some time owing to their being wrapped in paper and the wrapping of many of them not having been removed. *Held*, for the jury to say whether the delay precluded a recovery.

⁴See *ante*, § 1278 *et seq.*

⁵See *Mechem on Agency*, § 695 *et seq.*

On the other hand, though authorized to bind his principal, an agent may pledge his own responsibility, and thus become personally liable.¹ And if he warrants without authority,² or assumes to represent a principal having no legal existence,³ he is also personally liable. In tort the principal and agent may both be liable.⁴

A full discussion of this subject has been given in another work, and need not be repeated here.

§ 1816. — Purchaser of draft with bill of lading attached.— Where the seller of warranted goods ships them by carrier, taking a bill of lading in his own name, attaches to the bill of lading a draft drawn on the purchaser for the price, and then procures the discount of the draft by a transfer of the bill of lading, the bank or other party discounting the draft obtains a legal title to the goods, and, it has been held, becomes liable for the performance of the warranty subject to which the goods were sold.⁵

This doctrine, however, has been denied,⁶ and is thought not to be in accord with the established rules of law.⁷

§ 1817. Measure of damages for breach of warranty — In general.— Where the article furnished by the seller is not such in kind, quality or condition as it was expressly or impliedly warranted to be, the direct and natural loss to the buyer who keeps it is obviously the difference between the value of an article of the kind he was thus entitled to receive and the value

¹ See Mechem on Agency, § 552 *et seq.*

² See Mechem on Agency, § 541 *et seq.*

³ See Mechem on Agency, § 557.

⁴ See Mechem on Agency, § 182.

Where a person, acting as agent for another, contracted to sell plaintiff an engine of a certain kind, and knowingly delivered an inferior one, plaintiff may retain the engine and sue both principal and agent for damages on the false warranty.

Alpha Mills v. Watertown Co. (1895), 116 N. C. 797, 21 S. E. R. 917.

⁵ *Landa v. Lattin* (1898), 19 Tex. Civ. App. 246, 46 S. W. R. 48; *Finch v. Gregg* (1900), 126 N. C. 176, 35 S. E. R. 251, 49 L. R. A. 679, and exhaustive note.

⁶ *Tolerton & Stetson Co. v. Anglo-California Bank* (1901), — Iowa, —, 84 N. W. R. 930, 50 L. R. A. 777.

⁷ See note to *Finch v. Gregg*, in 49 L. R. A. 679.

of the article which he has in fact received. For this loss he is entitled to compensation. There may, of course, be other losses resulting from the seller's default, and these will be considered later; but the direct and immediate loss will be at least this difference in value.

For the breach of warranty, then, as to kind, quality or condition, the measure of the buyer's injury will be the difference between the value of an article of the kind warranted and the value of the article actually delivered; and for this difference the buyer may recover damages.¹ If the article delivered is

¹ Case Plow Works v. Niles (1895), 90 Wis. 590, 63 N. W. R. 1013 [citing Giffert v. West, 33 Wis. 617; Merrill v. Nightingale, 39 Wis. 247; Aultman v. Hetherington, 42 Wis. 622; Aultman v. Case, 68 Wis. 612]; Park v. Richardson (1895), 91 Wis. 189, 64 N. W. R. 859; Crane Co. v. Columbus Constr. Co. (1896), 46 U. S. App. 52, 20 C. C. A. 233, 73 Fed. R. 984; Moore Furniture Co. v. Sloane (1897), 166 Ill. 457, 46 N. E. R. 1128; Thoms v. Dingley (1879), 70 Me. 100, 35 Am. R. 310; Freyman v. Knecht (1875), 78 Pa. St. 141; Ogden v. Beatty (1890), 137 Pa. St. 197, 20 Atl. R. 620, 21 Am. St. R. 862; Shearer v. Park Nursery Co. (1894), 103 Cal. 415, 37 Pac. R. 412, 42 Am. St. R. 125; Berry v. Shannon (1896), 98 Ga. 459, 25 S. E. R. 514, 58 Am. St. R. 313; Meyer v. Green (1898), 21 Ind. App. 138, 69 Am. St. R. 344; Cary v. Gruman (1843), 4 Hill (N. Y.), 625, 40 Am. Dec. 299, and note; Voorhees v. Earl (1842), 2 Hill (N. Y.), 288, 38 Am. Dec. 588; Passinger v. Thorburn (1866), 34 N. Y. 634, 90 Am. Dec. 753; Hooper v. Story (1898), 155 N. Y. 171, 49 N. E. R. 773; Lewis v. Rountree (1878), 79 N. C. 122, 28 Am. R. 309; Case Threshing M. Co. v. Haven (1884), 65 Iowa, 359, 21 N. W. R. 677; Douglass v. Moses (1896), 89 Iowa, 40, 65 N. W. R. 1004; Porter v. Pool (1879), 62 Ga. 238; Rutan v. Ludlam (1862), 29 N. J. L. 398; Wheeler & Wilson Mfg. Co. v. Thompson (1885), 33 Kan. 491, 6 Pac. R. 902; Weybrich v. Harris (1883), 31 Kan. 92; St. Anthony Lumber Co. v. Bardwell-Robinson Co. (1895), 60 Minn. 199, 62 N. W. R. 274; Merrick v. Wiltse (1887), 37 Minn. 41, 33 N. W. R. 3; Sharpe v. Bettis (1895), — Ky. —, 32 S. W. R. 395; Reese v. Miles (1897), 99 Tenn. 398, 41 S. W. R. 1065; Nashua Iron & Steel Co. v. Brush (1898), 50 U. S. App. 461, 33 C. C. A. 456, 91 Fed. R. 213; Western Twine Co. v. Wright (1899), 11 S. Dak. 521, 78 N. W. R. 942, 44 L. R. A. 438. It is, indeed, often said that the measure of damages in these cases is the difference between the *price* paid and the actual *value* (Huyett & Smith Mfg. Co. v. Gray (1899), 124 N. C. 322, 32 S. E. R. 718; Courtney v. Boswell (1877), 65 Mo. 196; Thornton v. Thompson (1847), 4 Gratt. (Va.) 121; Boyles v. Overby (1854), 11 Gratt. 202; Van Winkle v. Wilkins (1888), 81 Ga. 93, 7 S. E. R. 644, 12 Am. St. R. 299); but this is erroneous. Park v. Richardson (1895), 91 Wis. 189, 64 N. W. R. 859; Clare v. Maynard (1837), 7 Car. & P. 741, 32 Eng. Com. L. 713; Loder v. Kekule (1857), 3 Com. B. (N. S.) 128, 91 Eng. Com. L. 126; Jones v. Just (1868), L. R. 3 Q. B. 197.

wholly worthless, then the entire value of such an article as this was warranted to be could be recovered.¹

§ 1818. — Of the value of the article as it should be, the price agreed to be paid is not conclusive evidence, though it may have some tendency to establish it.² To make it conclusive, however, would be to deprive the buyer of the benefit of his bargain. The same is true of the value of the article to be given in payment where the price was to be paid in goods or there was to be an exchange.³

So, on the other hand, it is said that "the price for which the purchaser had sold the goods cannot be shown in order to modify the rule, nor is it material whether he has sold them at all."⁴

The fact that the article was worth the price is immaterial if it would have been worth more had it been as warranted.⁵

§ 1819. — Time.— This difference in values which forms the measure of the buyer's damages is usually to be estimated as of the time of delivery agreed upon.⁶ There may be and are cases, however, in which the defect is not discoverable at the time of the delivery and cannot in the ordinary course of events be ascertained until a later period at which their real value, as contemplated by the parties, is to be manifested. Thus where young fruit trees were sold warranted to be of a certain variety,

¹ *Reggio v. Braggiotti* (1851), 7 v. *Watson*, 6 Metc. 246; *Brown v. Cush.* (Mass.) 166.

² *Carr v. Moore* (1860), 41 N. H. 131; *Street v. Chapman* (1867), 29 Ind. 142; *Aultman v. Hetherington* (1877), 42 Wis. 622; *Case Plow Works v. Niles*, *supra*. In the absence of any showing to the contrary it may be regarded as the value. *Seigworth v. Leffel* (1874), 76 Pa. St. 476.

³ *Rutan v. Ludlam* (1862), 29 N. J. L. 398.

⁴ *Case Plow Works v. Niles* (1895), 90 Wis. 590, 63 N. W. R. 1013 [citing *Muller v. Eno*, 14 N. Y. 597; *Medbury*

v. *Watson*, 6 Metc. 246; *Brown v. Bigelow*, 10 Allen, 242; *Bach v. Levy*, 101 N. Y. 511; *Jones v. Just*, L. R. 3 Q. B. 197]; *Andrews v. Schreiber* (1899), 93 Fed. R. 367 [citing further, *Cordage Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. R. 175; *Brown v. Emerson*, 66 Mo. App. 63; *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. R. 942].

⁵ *Douglass v. Moses* (1896), 89 Iowa, 40, 65 N. W. R. 1004.

⁶ *Eagle Iron Works v. Des Moines Suburban Ry. Co.* (1897), 101 Iowa, 289, 70 N. W. R. 193.

and it was impossible to discover that they were not until they first bore fruit, it was held that the buyer's damages might be estimated as of the latter date.¹

§ 1820. — **Place.**— This difference in values is, moreover, to be estimated ordinarily as of the place of delivery;² if, however, there is no market there, then at the nearest and most available market, with the cost of transportation added.³

§ 1821. **Measure of damages for breach of warranty when goods bought for special purpose.**— But while in the ordinary case the difference between the actual value and the agreed value is entirely adequate as damages, there may be cases in which a wider range is admissible. Thus, within the principle of *Hadley v. Baxendale*, already referred to, where the parties at the time of the making of the contract had in contemplation some special end or purpose for which the goods were warranted to be fit, then their value for the end or purpose so contemplated may be made the basis for estimating the damages.⁴

¹ *Shearer v. Park Nursery Co.* (1894), 103 Cal. 415, 37 Pac. R. 412, 42 Am. St. R. 125.

In *Ashworth v. Wells* (1898), 78 L. T. R. (Ct. of App.) 136, there was an action on a warranty of an orchid. Purchaser bought it at auction, and paid twenty guineas relying on the warranty that it was white. He cultivated it for two years, and when it flowered it was found to be a common purple one. If white it would have been worth fifty pounds at the time of the sale, while the purple was worth only 7s. 6d. Held, that the buyer could recover the fifty pounds.

In *Jones v. Just* (1868), L. R. 3 Q. B. 197, the plaintiffs, at Liverpool, entered into a contract with the defendant for the purchase of a quantity of Manilla hemp, to arrive from Singapore by a certain ship. When it arrived it was not in a merchantable condition, and had to be sold at

a loss. The court held that since the buyer bought it for the purpose of sale, and could not have inspected the goods, they must have been sold with the implied warranty that they were merchantable, and there was no error in measuring the damages by the rate which the hemp was worth when it arrived compared with the rate which the same hemp would have realized had it been shipped in the state in which it ought to have been shipped.

² *Heilman Milling Co. v. Hotaling* (Ky., 1899), 53 S. W. R. 655.

³ *Reese v. Miles* (1897), 99 Tenn. 398, 41 S. W. R. 1065 [citing *Coffman v. Williams*, 4 Heisk. 239; *McDonald v. Timber Co.*, 4 Pickle, 47].

⁴ *Berry v. Shannon* (1896), 98 Ga. 459, 25 S. E. R. 514, 58 Am. St. R. 313, and other cases cited in following sections.

§ 1822. — Damages for losses incidental to use or purpose contemplated.— For similar reasons, if the buyer, in endeavoring to put the articles to the use or apply them to the purpose for which they were so warranted to be suitable, sustains naturally and proximately some loss incidental to such use or application, compensation for that loss may be included.¹

Thus, for example, where the seller of a refrigerator warrants that it will keep meats until time for the spring market, and the buyer fills it with such meat and the meat is lost through defects in the refrigerator, the measure of damages is not simply the cost of remedying the defect, but will include the value of the meat lost, estimated at the value which it would have had if it had kept until the spring market.²

¹See *McCaa v. Elam Drug Co.* (1896), 114 Ala. 74, 21 S. R. 479, 62 Am. St. R. 88.

²*Beeman v. Banta* (1890), 118 N. Y. 538, 23 N. E. R. 887, 16 Am. St. R. 779, *Mechem's Cas. on Damages*, 259.

In *Tatro v. Brower* (1898), 118 Mich. 615, 77 N. W. R. 274, *assumpsit* was brought upon an express warranty in the sale of certain storage tanks by defendant to plaintiff. The tanks were purchased by plaintiff for the purpose of storing cider in them. This purpose was known to the defendant. The tanks, after being filled with cider, burst, and a judgment for plaintiff for the value of the cider lost was affirmed.

In *Stranahan Co. v. Coit* (1896), 55 Ohio St. 398, the defendant contracted to furnish pure milk to the plaintiff company, knowing that it was to be mixed with other milk and manufactured into butter and cheese. A servant of the defendant, whose duty it was to deliver the milk, adulterated it, so that the product from all the milk with which it was mixed was damaged. *Held*, that the vendee's damage should be at least com-

pensation, and if the mixture of the impure milk with that which was pure, and its use in the factory, resulted in impairing the value of the product, this must necessarily be considered in awarding compensation.

In *Coyle v. Baum* (1895), 3 Okl. 695, 41 Pac. R. 389, the plaintiff purchased from the defendants oats to be fed to his livery horses. The oats, however, contained castor beans, and some of the horses that ate them died and others were injured. The court held the rule to be "without exception, that when goods are sold for a particular purpose, and the buyer has no opportunity to inspect them, there is an implied warranty that such goods shall be suitable for the particular purpose for which they are sold." And damages were approved which covered the value of the horses which died, the damage suffered by the horses which did not die, the loss to the plaintiff's business during the time the horses were sick, and the money expended in treatment of the sick animals.

In *Accumulator Co. v. Dubuque*

§ 1823. —. So where the seller of seeds warranted them to be pure and good to raise a crop, and the buyer sowed them, but they failed to grow, it was held that compensation for the loss of his time, labor and use of his ground might be recovered.¹ And where the seller of carriage springs warranted them to be fit for use by a carriage builder, and they proved defective, the expense of taking them out of the carriages into which they had been incorporated and fitting others in their place was held to be a proper ground for compensation.²

St. Ry. Co. (1894), 27 U. S. App. 364, 64 Fed. R. 70, 12 C. C. A. 37, the plaintiff agreed to furnish a number of storage battery equipments for street cars, with certain warranties as to amount of work, durability, etc. The defendant, in order to install the storage batteries, incurred expenses in constructing shifting devices, which were rendered useless by the failure of the storage batteries to answer the purposes for which they were supplied and warranted. *Held*, that these expenses were properly recoverable as damages in an action on the warranty.

In *Nye & Schneider Co. v. Snyder* (1898), 56 Neb. 754, 77 N. W. R. 118, cement was sold to plaintiff for use in plastering a house, with a warranty of fitness for that purpose. *Held*, that expense of cleaning floors, patching the plastering, removing door and window casings preparatory to replastering, and loss of use of the house during the replastering were all proper subjects for recovery as damages. Expenses incurred in keeping and endeavoring to use a warranted stallion may be recovered. *National Horse Importing Co. v. Novak* (1895), 95 Iowa, 596, 64 N. W. R. 616.

¹*Shaw v. Smith* (1891), 45 Kan. 334, 25 Pac. R. 886, 11 L. R. A. 681, Me-

chem's Cas. on Damages, 260. Accord, *Reiger v. Worth* (1900), 127 N. C. 230. Compare cases in note to § 1827.

²*Thoms v. Dingley* (1879), 70 Me. 100, 35 Am. R. 310.

In *Randall v. Newson* (1877), L. R. 2 Q. B. Div. 102, the plaintiff bought of the defendant, who was a carriage manufacturer, a phaeton for two horses, the pole of which was so unfit for the purpose that it broke while the plaintiff was driving, and as a result the horses ran away and were damaged. The court held that on the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects, and the measure of damages in this case would be the value of the pole and the damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole.

In *Milburn v. Belloni* (1868), 39 N. Y. 53, the plaintiff was a manufacturer of brick, and bought from the defendants a quantity of coal dust for the stated purpose of using it in making brick. The vendors were told that if any dust of soft coal was contained in it it would damage or destroy the brick. It ap-

§ 1824. —. So where there was a sale of "Paris green" known to be intended for use in killing cotton worms, and an inferior article was furnished, it was held that damages for the loss of the crop thereby caused could be recovered, together with the cost of the compound, the expense of its application, and interest on the money so expended.¹

§ 1825. —. And so, further, where rags sold for making paper, and warranted to be free from contagion, were in fact infected with smallpox, it was held that recovery could be had, not only because they could not be made into paper without injury to the buyer's workmen, but also for sums paid out to support workmen disabled by the disease and for losses to business because of the crippled condition of the working force.²

For like reasons, the seller of diseased animals is liable not

peared that the dust did contain some soft-coal dust, and in consequence thereof the plaintiff's brick were injured. It was held that the extent of this injury to the brick was the proper measure of damages.

In *Brown v. Edgington* (1841), 2 Scott N. R. 497, the plaintiff, a wine merchant, sent to the shop of the defendant, who was a dealer in rope, for a crane-rope for hoisting casks of wine. The defendant's foreman went to see the crane, took the necessary measurements, and a rope was made and fixed by a servant of the defendant. The rope broke while a cask of wine was being raised, and it was held that the defendant was liable for the value of the wine lost, on an implied warranty that the rope was suitable for the use intended.

In *Johnston v. Faxon* (1899), 172 Mass. 466, 52 N. E. R. 539, there was an action for a breach of contract to build for the plaintiff, a retail dealer, three hundred bicycles of a certain kind, to be delivered during

certain months. The court said: "The contract expressly contemplated that the plaintiff was buying in order to sell again. The defendants knew that that was the object of the agreement. Especially in view of the part they took in fixing the retail price, they must be taken to have expected that the wheels would be sold at an advance." And it was held that damages for the loss of the orders which, on account of the breach, the plaintiff could not fill, were not too remote.

¹ *Jones v. George* (1884), 61 Tex. 345, 48 Am. R. 280.

Fertilizer.—For breach of a warranty of quality of a fertilizer, the buyer may recover for such losses as naturally and proximately result from the breach. *Reese v. Bates* (1897), 94 Va. 321, 26 S. E. R. 865. See also *Bell v. Reynolds* (1885), 78 Ala. 511, 56 Am. R. 52.

² *Dushane v. Benedict* (1886), 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. R. 696.

only for the loss of the animals infected, but also for other animals of the buyer to which without his fault the disease is communicated by those bought.¹

§ 1826. — Expenses incurred in preparing for what the seller is to do but fails to perform, or in doing that which the seller ought to have done, or in undoing that which he did improperly, fall clearly within the doctrines of the preceding sections, and may be included within the damages to be recovered.²

For like reasons money expended in a reasonable endeavor to avoid or diminish the injury resulting from the breach of warranty, as, for example, to cure an animal sold as sound, but found to be diseased, may be recovered.³ Expenses, however, in an unreasonable, hopeless or useless endeavor, or losses caused by continuous use after the defects were patent and evidently incurable, could not be recovered.⁴

¹ *Jeffrey v. Bigelow* (1835), 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Snowden v. Waterman* (1898), 105 Ga. 384, 31 S. E. R. 110.

² *Thoms v. Dingley* (1879), 70 Me. 100, 35 Am. R. 310.

In *Williams v. Thrall* (1898), 101 Wis. 337, 76 N. W. R. 599, it was held that the cost of putting in a new heater, in place of a defective one supplied, could be recovered.

In *Accumulator Co. v. Dubuque St. R. Co.* (1894), 27 U. S. App. 364, 64 Fed. R. 70, 12 C. C. A. 37, it is held that expenses incurred by a street-car company in constructing shifting devices necessary for the installation of a storage-battery system are recoverable as damages against the vendor of the storage-battery plant when the warranties contained in the contract of sale are broken to such an extent that the system is an utter failure, and the company is

compelled to abandon it, and the shifting devices then become useless.

In *Briggs v. Rumely Co.* (1895), 96 Iowa, 202, 64 N. W. R. 784, freight paid by a purchaser of a threshing machine was held recoverable as damages for breach of warranty of the machine, where the freight was made a part of the purchase price by the contract of sale.

³ See *Ellis v. Hilton* (1889), 78 Mich. 150, 43 N. W. R. 1048, *Mechem's Cases on Damages*, 409, 6 L. R. A. 454; *Watson v. Lisbon Bridge* (1837), 14 Me. 201 (cases of injury). Same in warranty cases. *Long v. Clapp* (1884), 15 Neb. 417; *Coyle v. Baum* (1895), 3 Okl. 695, 41 Pac. R. 389. Especially where the seller encouraged the buyer to treat the animal. *Murphy v. McGraw* (1889), 74 Mich. 318, 41 N. W. R. 917.

⁴ The purchaser of a machine sold with a warranty cannot, upon con-

§ 1827. — **Gains prevented** as well as losses sustained may be compensated under this rule. Thus, in another seed case, where the seller sold cabbage seeds and warranted them to produce Bristol cabbage, but the warranty was false, it was held that the damages would be the value of a crop of Bristol cabbages such as ordinarily would have been produced that year, less the cost of raising and the value of the crop of inferior cabbages actually produced.¹

§ 1828. — In many cases, however, of warranties of seeds, plants, and the like, the value of the crop cannot be made the basis of estimating the damages. In the ordinary case the land is not affected, but there may be cases, as, for example, where trees, shrubs, etc., are involved, in which the diminished

tinued use of the machine after its defects are obvious, recover of the vendor for the loss sustained by running the machine, or the amount paid out for repairs. *Gaar v. Stark* (1895, Tenn. Ch. App., aff'd), 36 S. W. R. 149.

Not remote or speculative expenses.—In *Sharp v. Bettis* (Ky., 1895), 32 S. W. R. 395, damages for extra care and expense which the buyer alleged he put upon a horse because he supposed it to be standard bred, as warranted, were denied because the loss was thought to be too remote. But cases can easily be imagined where it is believed that such damages might be recovered.

¹ *Passinger v. Thorburn* (1866), 34 N. Y. 634, 90 Am. Dec. 753.

In *Flick v. Wetherbee* (1866), 20 Wis. 392, the lessor of farming land covenanted to supply seed, but the seed which he supplied was almost worthless. The court was inclined to disapprove the rule that the measure of damages should be the difference between the crop which was raised

and a good crop of corn, on the ground that this would allow the plaintiff to recover the anticipated profits of a good crop, which in their nature are extremely speculative and contingent. But the rule was adhered to under the special circumstances of this case, it appearing that the defendant had definitely assumed such liability.

In *Wolcott v. Mount* (1873), 36 N. J. L. 262, Mount, a market gardener, applied to the appellants, who kept seeds for sale, for turnip seed of a particular variety, telling them that he wished to use it in raising a crop for the early market. The seed was furnished as of the kind specified and was planted, but it turned out to have been an inferior variety. A warranty having been found from the evidence, the measure of damages was held to be the difference between the market value of the crop raised and the same crop from the seed ordered. Affirmed in 38 N. J. L. 496.

In *Van Wyck v. Allen* (1877), 69

value of the land must be considered. Thus good fruit trees enhance the value of the land, and their value when planted can scarcely be estimated apart from the land on which they grow. It is held, therefore, in such cases, in analogy to cases of the destruction of or injury to such trees,¹ that damages for the breach of warranty of quality of fruit trees sold are to be

N. Y. 61, the plaintiff brought action on an alleged warranty against the defendants, who, as seed men, sold to the plaintiff a quantity of seed under the name of "Van Zicklen's early flat Dutch cabbage seed," knowing that the plaintiff intended to plant it in the course of his business as a market gardener. The seed was not as represented and did not produce any cabbages. The court held that the plaintiff might recover the value of the crop which would have been raised if the seed had been as represented, without deducting the cost of tillage. This case lays down a more liberal rule of damages than *Passinger v. Thorburn*, 34 N. Y. 634, though, as the court shows (p. 68), the two cases are not in conflict.

In *White v. Miller* (1877), 71 N. Y. 118, the plaintiffs bought from defendants a quantity of cabbage seed which was represented to be "Bristol" seed. The plaintiffs were market gardeners and desired this particular variety, which was considered especially valuable. But the seed did not produce Bristol cabbages, although it grew upon Bristol cabbage stocks, these stocks having been fertilized by pollen from another variety of cabbage. The court held that the plaintiffs clearly intended to buy, and the defendants to sell, seed which would produce Bristol cabbages, and it was therefore the crop produced which determined whether the seed satisfied the warranty of being Bris-

tol cabbage seed, rather than the nature of the plants which produced the seed. And the measure of damages was the difference in value between the crop as raised and the value of a similar crop of Bristol cabbages.

In *Edgar v. Breck* (1899), 172 Mass. 581, 52 N. E. R. 1083, there was an action for breach of a warranty that certain lily bulbs sold by the defendant to the plaintiff were of a kind known as *longiflorum*. The instruction was approved that if the bulbs were sold for the understood purpose of raising lilies for a particular market, the measure of damages would be the difference between the value of the crop which the plaintiff raised and a crop of *longiflorums*.

In *Ashworth v. Wells* (1898, Eng. Ct. of App.), 78 Law Times, 136, there was a sale by auction of an orchid with a warranty that when it flowered the flower would be white. A white flower of this variety was previously unknown. The buyer cultivated it for two years, when it flowered and the flower was purple, as was common. It was found that if it had been white the orchid would have been worth £50 at the time of the sale, and it was held that the buyer might recover that amount.

¹ See *Dwight v. Elmira*, etc. R. Co. (1892), 132 N. Y. 199, 30 N. E. R. 398, *Mechem's Cases on Damages*, 387, 15 L. R. A. 612, 28 Am. St. R. 563.

estimated by the difference in value of the land with and without the trees as warranted.¹

§ 1829. — **Purely speculative profits**, however, stand upon different ground. There are many cases, indeed, as has been already seen,² in which a loss of profits is properly to be compensated. There is nothing in profits, as such, which necessarily renders them an unfit basis for compensation: if they are certain and not speculative, they may be taken into account; but it happens in most cases that they are not certain but wholly indefinite, speculative and contingent, and in such cases clearly they furnish no proper foundation for an award of damages. What the buyer might have made if he had done something which he could have done if the seller had done some other thing which he ought to have done but did not do, comes obviously into the region of the uncertain and problematical.³

§ 1830. — Thus, where the seller of a brick machine warranted it to have the capacity to make a certain number of bricks per day, but the machine failed in this respect, it was held that the proper measure of damages was the difference in value between a machine with the capacity warranted and a machine like the one delivered, and not the profits which the buyer *might* have made on the larger quantity of bricks he

¹ *Heilman v. Pruyn* (1899), 122 Mich. 301, 81 N. W. R. 97.

² See *ante*, § 1761.

³ *Alpha Checkrower Co. v. Bradley* (1898), 105 Iowa, 537, 75 N. W. R. 369.

In *Noble v. Hand* (1895), 163 Mass. 289, 39 N. E. R. 1020, the plaintiff was to sell samples of defendant's goods and solicit orders for samples and for goods to be ordered from said samples, and was to receive a commission on all goods ordered from said samples, if not rejected by defendants. Plaintiff sent in orders for samples which were neither filled nor rejected, and he sought damages for

commissions on goods that would have been ordered if samples ordered had been sent. *Held*, too indefinite for more than nominal damages.

But profits that might have been made on a government dredging contract which contemplated the performance of specified work at a specified price are not too speculative to be recovered from the seller of dredging machinery who fails to deliver according to contract, where the contract is known to the seller. *Industrial Works v. Mitchell* (1897), 114 Mich. 29, 72 N. W. R. 25.

might have made and sold if the machine *had* had the capacity to make as many bricks as it was warranted to make.¹ In such a case the longer the buyer should continue to operate the defective machinery, even with knowledge of its defects, and the greater the deficiency in the number of bricks which he could thereby produce, the larger would be his damages.

§ 1831. — In the case last referred to,² the court cited with approval a case in Michigan in which the buyer sought to recover as damages the profits which he alleged he might have made from the operation of a saw-mill to be supplied by the seller. In that case the court, per Cooley, J., said: "The difficulty in measuring damages by profits is that they are commonly uncertain and speculative, and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of the contract. When that is the case they are said to be too remote; and the damages must be estimated on a consideration of such elements of injury as are more directly and certainly the result of the failure in performance. But in some cases profits are the best possible measure of damages, for the very reason that the loss is indisputable, and the amount can be estimated with almost absolute certainty. The case of a contract for the delivery of grain or any other article which at all times finds a ready sale at a current market price is an instance: if the contract is not performed, the purchaser may recover the advance beyond the purchase price; and this, though not recovered under the name of profits, is really nothing else. It often happens also that one contract, the performance of which will result in certain and definite profits, will be dependent upon the performance of another; and if the second contract is broken, the loss of definite and fixed profits under the other is a necessary and immediate consequence. There is no difficulty in saying in some such cases that profits lost are the proper measure of damages.³ But the profits of running a

¹ Moulthrop v. Hyett (1894), 105 Ala. 493, 17 S. R. 32, 53 Am. St. R. 139. non v. McEwan (1882), 48 Mich. 106, 11 N. W. R. 828, 42 Am. R. 458.

² Allis v. McLean (1882), 48 Mich. 428, 12 N. W. R. 640, citing McKin-³ Citing Loud v. Campbell, 26 Mich. 239; Booth v. Spuyten Duyvil Rolling

saw-mill are proverbially uncertain, indefinite and contingent. They depend on many circumstances, among which are capital, skill, supply of logs, supply and steadiness of labor; and one man may fail while another prospers, and the same man may fail at one time and prosper at another, though the prospective outlook seems equally favorable at both times. Estimates of profits seldom take all the contingencies into the account, and are therefore seldom realized; and if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is therefore very properly held in cases like the present that the party complaining of a breach of contract must point out elements of damage more certain and more directly traceable to the injury than prospective profits can be.”¹

§ 1832. — **Losses not contemplated.**— Consequences may, moreover, result which are so unusual as not to fall within the first branch of the rule in *Hadley v. Baxendale*, and which would have been regarded as so improbable that they could not fairly be said to have been within the contemplation of the parties at the time they made the contract as a probable result of its breach. Thus in a recent case in Minnesota, where a wholesale dealer in milk was charged with supplying skimmed milk to a retail dealer who was arrested and fined for selling it, it was held that the latter could not recover of the former damages for the loss and disgrace suffered from the arrest. “It is perfectly plain,” said the court, “that [the seller] could not have contemplated, when warranting the quality of the article, that the probable result of a breach of the contract

Mill Co., 60 N. Y. 487; *Salvo v. Duncan*, 49 Wis. 151; *Hitchcock v. Galveston*, 3 Woods, 287; *Fiegel v. Latour*, 81½ Pa. St. 448; *James v. Adams*, 8 W. Va. 568; *Waters v. Towers*, 8 Ex. 401.

¹ Citing *Fleming v. Beck*, 48 Pa. St. 309; *Pittsburg Coal Co. v. Foster*, 59

Pa. St. 365; *Strawn v. Cogswell*, 28 Ill. 457; *Frazier v. Smith*, 60 Ill. 145; *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 21 Am. R. 735. See also the full discussion in *Watson v. Kirby* (1895), 112 Ala. 436, 20 S. R. 624, where many other cases are cited.

would be plaintiff's arrest and conviction for the statutory offense with which he was charged."¹

§ 1833. Measure of damages for breach of warranty where goods bought to be resold.— So also, within principles already considered,² if the warranty by the seller was made with reference to a particular market in which the buyer expected to resell the goods, or a particular contract upon which he expected to supply them, then damages based upon their value in that market³ or under that contract may be recovered.⁴

Even though the buyer had not any particular market in view, yet if the seller knew that the buyer was buying for resale in some market, then the market price in any usual market within a reasonable time may be considered.⁵

§ 1834. — Damages paid sub-vendee for breach of same warranty.— Where the goods are thus known to be purchased for the purposes of resale, and they are resold with a similar warranty, the amount paid by the original vendee upon a judgment obtained against him by his sub-vendee for a breach of that warranty is, at least, *prima facie* evidence of the amount which he can recover from his vendor;⁶ and if he gave notice to his vendor of the pendency of the action and an opportunity

¹ *Sloggy v. Crescent Creamery Co.* (1898), 72 Minn. 316, 75 N. W. R. 225.

² See *ante*, § 1763.

³ *Reese v. Miles* (1897), 99 Tenn. 398, 41 S. W. R. 1065 [citing *Lewis v. Rountree*, 79 N. C. 122, 28 Am. R. 309; *Oldham v. Kerchener*, 79 N. C. 106]. In *Lewis v. Rountree* it is said: "There can be no doubt that a vendee, who takes a warranty and gives notice that he buys to sell again in another market, may include in his damages both the losses he actually sustained by reason of the breach and also the profits he would have made upon resale had the article been what it was warranted to be."

⁴ See *Booth v. Spuyten Duyvil Roll-*

ing Mill Co. (1875), 60 N. Y. 487, *Mecham's Cases on Damages*, 132.

⁵ *Lewis v. Rountree*, *supra*.

⁶ *Reggio v. Braggiotti* (1851), 7 Cush. (Mass.) 166; *Reese v. Miles* (1897), 99 Tenn. 398, 41 S. W. R. 1065; *Nashua Iron & Steel Co. v. Brush* (1898), 50 U. S. App. 461, 33 C. C. A. 456. 91 Fed. R. 213. In *Whitaker v. McCormick* (1878), 6 Mo. App. 114, the plaintiff purchased from the defendants, who were elevator proprietors, five carloads of "No. 2 white mixed corn," then stored in the elevator. He did not examine it, but at once resold it, and the sub-vendees recovered a judgment against him for breach of the warranty implied in the description.

to defend it, then the taxable costs of the action may be recovered in addition.¹ Counsel fees, however, have been held not recoverable, as "they vary so much with the character and distinction of the counsel that it would be dangerous to permit him to impose such a charge upon an opponent,"² though as to this, as has been seen, there is some difference of opinion.³

§ 1835. Buyer may recover for breach of warranty though he has not paid the price.—The mere fact that the buyer has not paid the price does not, in the absence of a stipulation to the contrary,⁴ prevent his suing to recover damages for the breach of warranty. Though a part of the contract of sale, the warranty is merely collateral, and the buyer has his action for its breach, leaving the seller to his appropriate remedy, by action or counter-claim, for the price.⁵

§ 1836. — Or though he has paid the price.—So the fact that the buyer may have paid the price, or given his note for it, however much it may bear upon the credibility of his complaints, does not debar him from recovering for the breach of warranty.⁶ And the fact that when sued for the price he did

The court held, following *Strong v. Insurance Co.*, 62 Mo. 289, that this judgment was conclusive against the original vendors, since notice of the suit was given them, together with a copy of the petition filed against said plaintiff by the sub-vendees, with the request that the said vendors assist him in the defense.

Liability to pay is sufficient. *Randall v. Raper* (1858), 1 El., Bl. & El. 84, 96 Eng. Com. L. 82.

¹ *Reggio v. Braggiotti*, *supra*; *Armstrong v. Percy* (1830), 5 Wend. (N. Y.) 535; *Blasdale v. Babcock* (1806), 1 Johns. (N. Y.) 517.

² *Reggio v. Braggiotti*, *supra*.

³ *Ante*. § 1798.

⁴ See *ante*, § 1813.

⁵ *Fitzpatrick v. Osborne* (1892), 50

Minn. 261, 52 N. W. R. 861 [citing *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. R. 88; *Thoreson v. Minneapolis Harvester Works*, 29 Minn. 341, 13 N. W. R. 156; *Schurmeier v. English*, 46 Minn. 306, 48 N. W. R. 1112]. To like effect: *Cash v. De Long* (Ky., 1899), 53 S. W. R. 1037.

⁶ *Elliott v. Puget Sound, etc. Co.* (1900), 22 Wash. 220, 60 Pac. R. 410; *Boorman v. Jenkins* (1834), 12 Wend. (N. Y.) 566, 27 Am. Dec. 158.

In *Nauman v. Ullman* (1899), 102 Wis. 92, 78 N. W. R. 159, plaintiff bought a horse from defendant with the express warranty that it was sound and well, except for a cold. He paid a three-days note given for the balance of the price, but without knowledge that the disease was other

not plead the breach of warranty as a defense, as he might have done, is not a bar to his maintaining a separate suit for the breach of warranty;¹ but a judgment against him where he did plead it would be a bar.²

§ 1837. — **Or though he may have resold the goods.**— The mere fact, moreover, that the buyer has sold the goods to another does not preclude his recovery of damages for a breach of the warranty of quality.³ Such a resale, as has been seen, is often contemplated by the parties at the time of the original purchase; and even where it is not, the fact of the resale cannot affect the warrantor's liability except as the price received upon the resale may furnish some evidence of the actual value of the goods.

§ 1838. — **Or though he may have made a profit on them.** So the fact that the goods sold subsequently enhance in price so that the buyer makes a profit on them is held to be immaterial. "Any advance in the market was the legitimate fruit of the venture, just as the purchaser would have had to bear the loss of any decline in the market price prevailing at the time of delivery."⁴

than a cold. After the death of the horse he brought suit on the warranty. *Held*, that there had been no waiver of the warranty.

In *Northwestern Cordage Co. v. Rice* (1896), 5 N. D. 432, 57 Am. St. R. 563, 67 N. W. R. 298, it is held that where goods are sold under a warranty (implied), the giving of a note by the purchaser for the purchase price, with knowledge that the goods did not conform to the warranty, does not prejudice his rights, where he expressly reserves his right to insist upon damages.

¹ *Cook v. Moseley* (1835), 13 Wend. (N. Y.) 277; *Gilmore v. Williams*

(1894), 162 Mass. 351, 38 N. E. R. 976, citing many cases.

² *Gilmore v. Williams, supra*.

³ *Eagle Iron Works v. Des Moines Suburban Ry. Co.* (1897), 101 Iowa, 289, 70 N. W. R. 193. A purchaser of merchandise that has been warranted, and proves worthless, may defeat a recovery for any amount, though he sold a part of the merchandise for cash, and the buyer made no claim on account of defects. *Western Twine Co. v. Wright* (1899), 11 S. Dak. 521, 78 N. W. R. 942, 44 L. R. A. 438.

⁴ *Andrews v. Schreiber* (1899), 93 Fed. R. (Ct. Ct. W. D. Mo.) 367.

§ 1839. Remedies for deceit or fraud.—It is entirely consistent with liability for breach of warranty that the seller acted in the best of faith.¹ There may, of course, be fraudulent warranties, and remedies for these have already been referred to.² There may, however, be many cases into which fraud or deceit will more actively enter, in which the remedy as for breach of warranty will not be the most desirable or adequate, and a brief consideration of the remedies appropriate to the case is necessary.

The buyer who has been imposed upon or misled by the fraud of the seller has usually his choice of a variety of remedies. For example: (1) He may rescind the contract, restore what he has received and recover what he has parted with. (2) He may retain the property and bring an action for damages for the deceit. (3) He may retain the property, and in an action by the seller for the price may be allowed damages for the injury caused by the deceit.³

Enough has already been said of the buyer's right to rescind.⁴ The third remedy will be considered in later sections,⁵ and the action for deceit or fraud will be considered here.

§ 1840. — Elements of fraud.—What the various elements are which must be present to establish fraud in law,⁶ and what are the chief forms of fraud upon the buyer,⁷ have been already considered in previous sections and need not be repeated. There must, of course, be fraud. The false representation relied upon must have been made with knowledge of its falsity, or, at least, without belief in its truth. The somewhat diverse views upon this question have been already noticed, and it will suffice to refer to that discussion.⁸

¹ See *ante*, § 1239.

² See *ante*, § 820.

³ See *ante*, § 940; *Lukens v. Aiken* (1896), 174 Pa. St. 152, 34 Atl. R. 575; *Wilson v. Cattle Co.* (1896), 36 U. S. App. 634, 20 C. C. A. 244, 73 Fed. R. 994; *Olcott v. Bolton* (1897), 50 Neb. 779, 70 N. W. R. 366.

⁴ See *ante*, § 930 *et seq.*

⁵ See *post*, § 1844.

⁶ See *ante*, §§ 866–885; *Bank of Atchison v. Byers* (1897), 139 Mo. 627, 41 S. W. R. 325; *Wilman v. Mizer* (1895), 60 Ark. 281, 30 S. W. R. 31.

⁷ See *ante*, §§ 930–942.

⁸ See *ante*, § 875 *et seq.*; *Scholfield Gear & Pulley Co. v. Scholfield* (1898), 71 Conn. 1, 40 Atl. R. 1046.

It is also indispensable that the buyer should have been deceived,¹ and he cannot claim to have been deceived where he had ample experience and the alleged defects were open to his view.²

§ 1841. — **Reliance on representations.**— At the same time, as has also been seen,³ the buyer is not bound to be suspicious or to investigate the truthfulness of the seller's representations before relying upon them. He cannot close his eyes to what is obvious;⁴ but, on the other hand, the seller who has made false statements to influence the action of the buyer cannot defend upon the ground that the buyer ought not to have believed him or was too readily deceived.⁵

If the seller made positive representations as to matters of fact, the falsity of which is not obvious, the buyer may rely upon them, and it is no excuse that had he been more suspicious and investigated for himself he might have discovered that they were false.⁶ Especially is this true where the facts are

¹ See *ante*, § 934.

² See *ante*, §§ 879, 880; *Max v. Harris* (1899), 125 N. C. 345, 34 S. E. R. 437.

³ See *ante*, § 881.

⁴ See *ante*, § 879.

⁵ See *ante*, § 881; *Strand v. Griffith* (1899), 38 C. C. A. 444, 97 Fed. R. 854; *Wilman v. Mizer* (1895), 60 Ark. 281, 30 S. W. R. 31.

⁶ See *ante*, § 881. See also *Fargo Gaslight Co. v. Fargo Gas Co.* (1894), 4 N. Dak. 219, 59 N. W. R. 1066, 37 L. R. A. 593, and the exhaustive note in the last-named volume. Corliss, J., also discusses the question fully, saying: "The defendant, as a matter of law, had a right to rely implicitly upon the statements made by plaintiff touching the character of this plant. So long as defendant did not actually know the representations to be false, it was under no obligation to investigate to determine their truth or

falsity. In *Mead v. Bunn*, 32 N. Y. 275, the court says: 'Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' In *Redding v. Wright*, 49 Minn. 322 (a case very much in point), the court says: 'If the representations were fraudulently made, with the intent to induce the plaintiff to rely upon the fact being as represented, and to act upon the belief thus induced, the wrong-doer who succeeds in such a purpose is not to be shielded from responsibility by the plea that the defrauded party would have discov-

peculiarly within the knowledge of the seller, and there is nothing to arouse the buyer's suspicion.¹

Whether, under the circumstances, the buyer was justified

ered the falsity of the representations if he had pursued such means of information as were available to him.' While the rule has been in some cases stated in terms more favorable to plaintiff, yet no decision can be found which establishes a doctrine under which defendant would be bound, under the circumstances of this case, to make any investigation or inquiry touching the truth or falsity of the statements made in connection with the sale. There are many well-considered cases which sustain our view that defendant had a right implicitly to rely upon the representations made by plaintiff with respect to the character of the property to be purchased by defendant.

"In addition to the cases already cited, we refer to *Maxfield v. Schwartz*, 45 Minn. 150, 10 L. R. A. 606; *Gardner v. Trenary*, 65 Iowa, 646; *Schumaker v. Mather*, 133 N. Y. 590; *McClellan v. Scott*, 24 Wis. 81; *Caldwell v. Henry*, 76 Mo. 254; *Oswald v. McGehee*, 28 Miss. 340; *Cottrill v. Krum*, 100 Mo. 398; *Campbell v. Frankem*, 65 Ind. 591; *Kerr, Fraud & Mistake*, 77, 80, 81; *Erickson v. Fisher*, 51 Minn. 300; *Alfred Shrimpton & Sons v. Philbrick*, 53 Minn. 366; *Barndt v. Frederick*, 78 Wis. 1, 11 L. R. A. 199; *Bigelow*, Fr. 522-528. We are aware that cases can be found which exact from the buyer more care in ascertaining the truth or falsity of representations than the decisions just cited. These cases appear to us to have been rightfully

decided, in view of the facts. In determining what the courts in such cases intended to hold, the language of each opinion must be read, in the light of the facts of the particular case. The unmistakable drift is towards the just doctrine that the wrong-doer cannot shield himself from liability by asking the law to condemn the credulity of his victim. The falsity of the statement may be apparent because the thing misrepresented is before the buyer, and the most casual look will suffice to discover the falsehood, no artifice being used to divert his attention; or the statement may carry its own refutation upon its face,—may be so absurd or monstrous that it is palpably false, as a statement by a person carrying on a business known to the purchaser to be very small that the receipts of the business are \$1,000,000 a year. In these and other similar cases, the law will not allow a person to assert that he was deceived. But the general rule is, and, upon principle, must be, that the question is one of reliance by the buyer upon the false statements of the seller. Whether it was wise for him to rely upon it, whether he was prudent in so doing, whether he is not chargeable with negligence in a certain sense in not investigating,—these inquiries are, in general, immaterial, provided the purchaser has in fact been deceived. The circumstances under which fraud is accomplished are so varied, the nature of the property and the character of the mis-

¹ *Stewart v. Stearns* (1884), 63 N. H. 99, 56 Am. R. 496.

in relying upon the representations, is, as has been seen,¹ usually a question for the jury.²

§ 1842. — **Representations must have been proximate cause of injury complained of.**—It is essential also here, as in any other case, that the loss complained of shall have been the natural and proximate result of the fraud alleged. “Pecuniary loss is the test of actionable fraud when damages are sought,” but this must be a pecuniary loss happening in the natural course of things as the consequence of the fraud perpetrated. “Lost profits come within that rule when there is a definite standard from which to determine such profits, but otherwise they are regarded as too remote.”³

§ 1843. — **Measure of damages.**—With respect of the measure of damages which the defrauded buyer may recover, two rules seem to prevail. One, that the buyer may recover the difference between the actual value of the article as delivered and the contract price;⁴ the other, that he is entitled to

representations are so widely different, in different cases, that it is unwise to attempt to enunciate with precision a general rule by which all cases shall be governed. It is better to decide the cases as they arise, keeping in view the general principle that courts will not readily listen to the plea that the defrauded party was too easily deceived.”

¹ See *ante*, § 883.

² *Whiting v. Price* (1898), 172 Mass. 240, 51 N. E. R. 1084; *Ingalls v. Miller* (1889), 121 Ind. 188, 22 N. E. R. 995.

³ See *Potter v. Necedah Lumber Co.* (1899), 105 Wis. 25, 81 N. W. R. 118. In an action of tort for the false warranty that a horse was kind, damages for injuries to the buyer's wagon and harness in consequence, as alleged, of the unkindness of the horse, cannot be recovered. *Case v. Stevens* (1884), 137 Mass. 551.

⁴ See *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.* (1894), 4 N. Dak. 219, 59 N. W. R. 1066, 37 L. R. A. 593 [citing *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737; *Atwater v. Whiteman*, 41 Fed. R. 427; *Glaspell v. Northern Pac. R. Co.*, 43 Fed. R. 900; *High v. Berret*, 148 Pa. St. 261, 23 Atl. R. 1004; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279; *Reynolds v. Franklin*, 44 Minn. 30, 46 N. W. R. 139; *Redding v. Godwin*, 44 Minn. 355, 46 N. W. R. 563; *Alden v. Wright*, 47 Minn. 225, 49 N. W. R. 767; *Stickney v. Jordan*, 47 Minn. 262, 49 N. W. R. 980].

In *Rockefeller v. Merritt* (1896), 40 U. S. App. 666, 22 C. C. A. 608, 76 Fed. R. 909, 35 L. R. A. 633, it is said: “The true measure of the damages suffered by one who is fraudulently induced to make contract of sale, purchase or exchange of property is

the difference between the value of the article if it had been as represented and its actual value as delivered.¹ "It is obvious," said the court in a recent case,² "that these two rules cannot be reconciled. One gives to the party deceived the full benefit of his bargain. The other does not. We are clear that the best reason is with the doctrine that, where one is deceived and defrauded, he can recover as damages the difference

the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained and not the profits which he might have made by the transaction. It excludes all speculation and is limited to compensation" [citing *Smith v. Bolles*, *supra*; *Busterud v. Farrington*, 36 Minn. 320; *Reynolds v. Franklin*, *supra*; *Stickney v. Jordan*, *supra*; *Fixen v. Blake*, 47 Minn. 540, 50 N. W. R. 612; *Wallace v. Hallowell*, 56 Minn. 501, 58 N. W. R. 292; *Woolenslagle v. Runals*, 76 Mich. 545, 43 N. W. R. 454; *McAleer v. Horsey*, 35 Md. 439; *Buschman v. Codd*, 52 Md. 202; *High v. Berret*, *supra*].

¹ *Fargo Gas L. & Coke Co. v. Fargo Gas & Elect. Co.*, *supra* [citing *Page v. Wells*, 37 Mich. 415; *Williams v. McFadden*, 23 Fla. 143; *Nysewander v. Lowman*, 124 Ind. 584; *Noyes v. Blodgett*, 58 N. H. 502; *Stiles v. White* 11 Metc. (Mass.) 356. 45 Am. Dec. 214; *Lunn v. Shermer*, 93 N. C. 164; *Vail v. Reynolds*, 118 N. Y. 297; *Morse v. Hutchins*, 102 Mass. 439; *Doran v. Eaton*, 40 Minn. 35; *Woolman v. Wirtsbaugh*, 22 Neb. 490; *Drew v. Beall*, 62 Ill. 164; *Cox v. Gerkin*, 38 Ill. App. 340; *Wynn v. Longley*, 31 Ill. App. 616; *Krumm v. Beach*, 96 N. Y. 398; *Whitney v. Allaire*, 1 N. Y. 305; *Horne v. Walton*, 117 Ill. 130; *Jackson v. Armstrong*, 50 Mich. 65; *Matlock v. Reppy*, 47 Ark. 148, 14 S. W.

R. 546; *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Woodward v. Thacher*, 21 Vt. 580, 52 Am. Dec. 73; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172].

In *Warner v. Benjamin* (1895), 89 Wis. 290, 62 N. W. R. 179, it is said: "The well-established rule of damages upon a sale of personal property which is voidable on account of fraudulent representations is the difference between the real value of the article sold at the time of the sale and what the value would have been had the representations been true."

To same effect: *Potter v. Necedah Lumber Co.* (1899), 105 Wis. 25, 81 N. W. R. 118; *Whiting v. Price* (1898), 172 Mass. 240, 51 N. E. R. 1084.

In the case of a horse, this difference in value plus the expense of keeping him a reasonable time to test his correspondence with the representations. *Peak v. Frost* (1894), 162 Mass. 298, 38 N. E. R. 518.

Misrepresentation as to selling price.—Where the seller falsely asserts that the price made is the same as that at which he sold to another person, and the sale is made on that express understanding, the measure of damages will be the difference between these two sums. *Kilgore v. Bruce* (1896), 166 Mass. 136, 44 N. E. R. 108. Compare *Potter v. Necedah Lumber Co.* (1899), 105 Wis. 25, 81 N. W. R. 118.

² *Fargo Gas L. Co. v. Fargo Gas & Elec. Co.*, *supra*.

between the value of what he would have obtained had the statement been true, and the value of what he actually received. This represents his actual loss by reason of the fraud of the seller, on the theory that he does not rescind the contract. Of course, if he sees fit to rescind for fraud, he can only recover back what he has paid. But if he desires to stand by the agreement, as he has a perfect right to do, he can logically say to the wrong-doer, 'If you had told me the truth, the property would have been worth so much. It is not worth so much because it is not as you represented it. I demand that you make good the difference in money.'"

The weight of authority seems clearly with the latter view.

§ 1844. Buyer may recoup damages in action by seller for price.—Instead of taking active steps for the recovery of his damages by bringing an action against the seller, the buyer who has not paid the price may wait until he is sued for it by the seller, whether the action be upon the count for goods sold, etc., or upon a note given for the price, and may then avail himself of his demand, whether for failure to perform, breach of warranty or fraud, by way of recoupment or counter-claim.¹ Where he does so, the same general rules govern his right to damages as where he takes the initiative. In this case, as in that, he is not bound to offer to return the goods or to give

¹Steigleman v. Jeffries (1815), 1 Serg. & Rawle (Pa.), 477, 7 Am. Dec. 626; Peden v. Moore (1831), 1 Stew. & Port. (Ala.) 71, 21 Am. Dec. 649; McAlpin v. Lee (1837), 12 Conn. 129, 30 Am. Dec. 609; Getty v. Rountree (1850), 2 Pin. (Wis.) 379, 54 Am. Dec. 138; Falconer v. Smith (1851), 18 Pa. St. 130, 55 Am. Dec. 611; Huntington v. Lombard (1900), 22 Wash. 202, 60 Pac. R. 414; Tacoma Coal Co. v. Bradley (1891), 2 Wash. 600, 27 Pac. R. 454, 26 Am. St. R. 890; Underwood v. Wolf (1890), 131 Ill. 425, 23 N. E. R. 598, 19 Am. St. R. 40; Har-

row Spring Co. v. Whipple Harrow Co. (1892), 90 Mich. 147, 51 N. W. R. 197, 30 Am. St. R. 421; Hodge v. Tufts (1896), 115 Ala. 366, 22 S. R. 422; Wilbur Lumber Co. v. Oberbeck Co. (1897), 96 Wis. 383, 71 N. W. R. 605; Parry Mfg. Co. v. Tobin (1900), 106 Wis. 286, 82 N. W. R. 154; Kester v. Miller (1896), 119 N. C. 475, 26 S. E. R. 115; St. Anthony Lumber Co. v. Bardwell-Robinson Co. (1895), 60 Minn. 199, 62 N. W. R. 274; Springfield Milling Co. v. Barnard (1897), 49 U. S. App. 438, 26 C. C. A. 389, 81 Fed. R. 261.

notice of the defects, as a condition precedent to making his defense.¹ Neither is he, in this case any more than in the other, bound to anticipate and search for defects before using or disposing of the goods.² In this case, also, as in the other, the fact that he may have paid part of the price does not debar him from this defense;³ nor will the fact that he may not have paid in the manner agreed upon.⁴

§ 1845. Defense of failure of consideration.—As has been seen in an earlier chapter,⁵ the seller may so far fail in the performance of the undertakings on his own part which are conditions precedent to the undertaking of the buyer that the latter when called upon by the former to perform may defend upon the ground that the consideration for his promise has so completely failed as to release him from liability.

¹ Thus, in *Tacoma Coal Co. v. Bradley*, *supra*, it is said: "That the vendee may retain the goods without notice, and plead breach of warranty in an action by the vendor for the purchase price, is shown by numerous authorities [citing *Dayton v. Hooglund*, 39 Ohio St. 671; *Polhemus v. Heiman*, 45 Cal. 573; *Holloway v. Jacoby*, 120 Pa. St. 583, 15 Atl. R. 487, 6 Am. St. R. 737; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Bagley v. Cleveland Rolling Mill Co.*, 22 Blatchf. 342, 21 Fed. R. 159].

Retention of a machine sold under a warranty, in the absence of any agreement as to its retention or return, does not prevent the vendee from setting up the warranty by way of counter-claim when sued for the price. *Hooper v. Story* (1898), 155 N. Y. 171, 49 N. E. R. 773.

If a buyer has by mistake received what he did not buy he may return it or keep it and recoup, when sued for the price; or, if he has paid the

price, he may sue for the difference between the price paid and the market price of the substituted article. *Columbian Iron Works v. Douglass* (1896), 84 Md. 44, 34 Atl. R. 1118, 33 L. R. A. 103, 57 Am. St. R. 362.

² *Tacoma Coal Co. v. Bradley*, *supra*.

³ A partial or complete want of consideration may be pleaded to an action on a note for the price of property, where there has been a breach of warranty. Payment of interest coupons will not estop the maker of the note from making this defense. *Huntington v. Lombard* (1900), 22 Wash. 202, 60 Pac. R. 414.

⁴ A buyer of an engine may defend an action on his note for the price by pleading fraudulent representations, notwithstanding the fact that he failed to give a mortgage on the engine to secure the note according to his agreement. *Cash v. De Long* (Ky., 1899), 53 S. W. R. 1037.

⁵ *Ante*, § 831 *et seq.*

§ 1846. —. Thus, recalling what has been already elsewhere said, where the goods contracted for are never delivered at all,¹ or, though delivery were tendered, were not of such kind, quality or condition, or in such quantity, at such place or time, that the buyer was bound to receive them, and he rejected them,² or, if delivered, were returned by virtue of an express or implied right to do so, or have become worthless because of the failure of the seller to perform his agreement with respect of them,³ there would clearly be such an entire failure of consideration as would defeat a recovery by the seller. These matters, as has been so often seen, stand as conditions precedent to the buyer's liability. And the same result would ensue if the seller failed, in such respects, in part only where the contract was entire,⁴ or *pro tanto* where it was severable.⁵

§ 1847. —. So, as has been seen, where patents sold prove, not simply of little or no value, but void;⁶ or notes, bonds, scrip and other similar commercial securities prove not to be genuine;⁷ or the seller is found to have no title to the goods which he has assumed to sell,⁸ and the like cases, there is such a failure of consideration as will defeat recovery.

§ 1848. Recovery as for failure of consideration.— And lastly, there are, as has also been seen,⁹ many cases in which there has been such a complete and total failure on the part of

¹ See, for example, *Nash v. Towne* (1866), 72 U. S. (5 Wall.) 689.

² See, for example, *Pope v. Allis* (1885), 115 U. S. 363.

³ See *Norris v. Harris* (1860), 15 Cal. 226.

⁴ There is a total failure of consideration for notes given for the purchase price of trees where the seller agreed to set them out and care for them and failed to do so, the result being their total loss. A total failure of consideration may be shown under the general issue. *Perkins v. Brown* (1897), 115 Mich. 41, 72 N. W. R. 1095.

⁵ See *Young Mfg. Co. v. Wakefield* (1876), 121 Mass. 91; *Wheadon v. Olds* (1838), 20 Wend. (N. Y.) 174; *Hill v. Rewee* (1846), 11 Metc. (Mass.) 268; *Morgan v. McKee* (1874), 77 Pa. St. 228; *Richards v. Shaw* (1873), 67 Ill. 222. Or, though originally entire, is treated by the buyer as severable. *Avery v. Willson* (1880), 81 N. Y. 341, 37 Am. R. 503.

⁶ *Ante*, § 834.

⁷ *Ante*, § 835.

⁸ *Ante*, § 836.

⁹ *Ante*, §§ 838, 839.

the seller to perform that which was a condition precedent to the buyer's liability, that the latter, treating the contract as at an end, may, instead of waiting to be sued, take the initiative on his own part and recover what he has parted with as having been obtained from him upon a consideration which has failed.

§ 1849. — Thus, to repeat what has already been stated in earlier sections, if the buyer has paid the price, but the title has failed and he has been divested by the true owner;¹ or if he has paid for a patent which proves to be invalid;² or if he has paid for commercial instruments, such as notes, bonds, scrip, and the like, which prove not to be genuine,³—in these and the like cases he may recover his money as paid without consideration.

§ 1850. — So, if the buyer has paid the price in advance, but has never received the goods at all;⁴ or has rejected them wholly, as he had the right to do because they were not such as the contract contemplated;⁵ or if they were not as agreed,

¹ Eicholtz v. Bannister (1864), 17 Com. B. (N. S.) 708; Ledwick v. McKim (1873), 53 N. Y. 307; Wilkinson v. Ferree (1855), 24 Pa. St. 190.

² Darst v. Brockway (1842), 11 Ohio, 462.

³ Frank v. Lanier (1883), 91 N. Y. 112; Wood v. Sheldon (1880), 42 N. J. L. 421, 36 Am. R. 523; Thompson v. McCullough (1860), 31 Mo. 224, 77 Am. Dec. 644; Gurney v. Wormsley (1854), 4 El. & Bl. 133, 82 Eng. Com. L. 132; Paul v. Kenosha (1867), 22 Wis. 256, 94 Am. Dec. 598; Terry v. Bissell (1857), 26 Conn. 23.

⁴ Nash v. Towne (1866), 72 U. S. (5 Wall.) 689; Smiley v. Barker (1897), 83 Fed. R. 684, 55 U. S. App. 125, 25 C. C. A. 9; Winn v. Morris (1894), 94 Ga. 452, 20 S. E. R. 339; Dalton v.

Bentley (1854), 15 Ill. 420; Cleveland v. Sterrett (1871), 70 Pa. St. 204. In Winn v. Morris (1894), 94 Ga. 452, 20 S. E. R. 339, seventy dollars was paid for a mule and \$1.80 extra for delivery at another place. No delivery was made at either place. Buyer may recover amount paid, with interest. Death of mule after expiration of time within which delivery was to be made, no obstacle to recovery.

⁵ Pope v. Allis (1885), 115 U. S. 363. Where an article delivered does not conform to the description under which it was sold, the vendee is not bound to accept, and may recover whatever of the purchase price he has paid. Meader v. Cornell (1895), 58 N. J. L. 375, 33 Atl. R. 960.

but entirely worthless;¹ or if the agreed article has not been delivered, but another substituted for it, and the latter has been returned,²—in these and similar cases there is a total failure of consideration, and the buyer may recover his money. He may likewise do so *pro tanto* where he has paid for more than he has received.³

¹ Peterson v. Door, Sash & Lumber Co. (1883), 51 Mich. 86, 16 N. W. R. 243; Ripley v. Case (1889), 78 Mich. 126, 43 N. W. R. 1097, 18 Am. St. R. 428.

² Howe Machine Co. v. Willie (1877), 85 Ill. 333.

³ Devaux v. Conolly (1849), 8 C. B. 640, 65 Eng. Com. L. 639; Wheadon v. Olds (1838), 20 Wend. (N. Y.) 174; Hill v. Rewee (1846), 11 Metc. (Mass.) 268; Devine v. Edwards (1877), 87 Ill. 177; (1881) 101 Ill. 138.

APPENDIX.

In several of the States, as, for example, California (Civil Code, § 1721 *et seq.*), Montana (Civil Code, § 2310 *et seq.*), North Dakota (Civil Code, § 3948 *et seq.*), Georgia (Civil Code, § 3526), and others, the law of Sale has been to some extent reduced to the form of statute. These statutes, however, are too numerous and varied to be reproduced here, though they must constantly be considered in determining the law in the States where they exist. The most important statute of this nature is, perhaps, the English act, and for the purposes of comparison with the rules established by the courts it will be given here.

SALE OF GOODS ACT, 1893.

(Chapter 71 of 56 & 57 Victoria.)

AN ACT FOR CODIFYING THE LAW RELATING TO THE SALE OF GOODS.

(February 20, 1894.)

PART I.

FORMATION OF THE CONTRACT.

CONTRACT OF SALE.

1. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the

conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessities are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

FORMALITIES OF THE CONTRACT.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4. (1) A contract for the sale of any goods of the value of ten pounds or upward shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

SUBJECT-MATTER OF CONTRACT.

5. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

THE PRICE.

8. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9. (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party can not or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

CONDITIONS AND WARRANTIES.

10. (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.

11. (1) In England or Ireland —

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either

within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or incumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

SALE BY SAMPLE.

15. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample —

(a) There is an implied condition that the bulk shall correspond with the sample in quality:

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of reasonable time. What is a reasonable time is a question of fact.

Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

TRANSFER OF TITLE.

21. (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect —

(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) The validity of any contract of sale under any special common-law or statutory power of sale or under the order of a court of competent jurisdiction.

22. (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24. (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25. (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title

to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26. (1) A writ of *fiery facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31. (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32. (1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable hav-

ing regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34. (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38. (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

(2) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39. (1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law —

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c) A right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

UNPAID SELLER'S LIEN.

41. (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43. (1) The unpaid seller of goods loses his lien or right of retention thereon —

(a) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

STOPPAGE IN TRANSITU.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46. (1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.

RESALE BY BUYER OR SELLER.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

48. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of resale in case the buyer should make default, and, on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

REMEDIES OF THE SELLER.

49. (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to

pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

REMEDIES OF THE BUYER.

51. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. In the case of a sale by auction —

(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61. (1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62. (1) In this Act, unless the context or subject-matter otherwise requires,—

“Action” includes counterclaim and set off, and in Scotland condescendence and claim and compensation:

“Bailee” in Scotland includes custodier:

“Buyer” means a person who buys or agrees to buy goods:

“Contract of sale” includes an agreement to sell as well as a sale:

“Defendant” includes in Scotland defender, respondent, and claimant in a multipointing:

“Delivery” means voluntary transfer of possession from one person to another:

“Document of title to goods” has the same meaning as it has in the Factors Acts:

“Factors Acts” means the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

“Fault” means wrongful act or default:

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale:

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

“Lien” in Scotland includes right of retention:

“Plaintiff” includes pursuer, complainer, claimant in a multiplepinding and defendant or defender counterclaiming:

“Property” means the general property in goods, and not merely a special property:

“Quality of goods” includes their state or condition:

“Sale” includes a bargain and sale as well as a sale and delivery:

“Seller” means a person who sells or agrees to sell goods:

“Specific goods” mean goods identified and agreed upon at the time a contract of sale is made.

“Warranty” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done “in good faith” within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. This Act may be cited as the Sale of Goods Act, 1893.

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